

General Topics in Law and Policy

Fee Shifting Under the Equal Access to Justice Act— A Qualified Success

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Congress first waived the government's general immunity from attorney-fee awards by passing the Equal Access to Justice Act ("EAJA" or the "Act") in 1980.¹ The Act was reenacted in 1985.² By authorizing courts to award attorney's fees to private parties of modest means who prevail in litigation against the United States, Congress presumably sought to achieve three interconnected goals: to provide an incentive for private parties to contest government overreaching, to deter subsequent government wrongdoing, and to provide more complete compensation for citizens injured by government action.³ The United States pays almost two thousand EAJA awards in a typical

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1. Pub. L. No. 96-481, 94 Stat. 2321, 2325-30 (codified as amended at 28 U.S.C. § 2412 (1988 & Supp. IV 1992) and 5 U.S.C. § 504 (1988)).

2. Pub. L. No. 99-80, 99 Stat. 183. As originally enacted, the Act included a three-year sunset provision. President Reagan vetoed a legislative proposal to make the Act permanent in 1984 because of his opposition to two provisions, one which would have required the government to show that both its underlying position and its position in the litigation were "substantially justified" in order to preclude fee shifting, and another that would have required the payment of interest by the United States on fee awards not paid within sixty days. Memorandum Returning Without Approval a Bill To Reauthorize the Equal Access to Justice Act, 2 PUB. PAPERS 1811 (Nov. 8, 1984). Legislation to extend the Act was subsequently reintroduced in Congress, and with several minor additions, this version was signed by the President on August 5, 1985.

The Act has since been amended twice, as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 1948, and of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3746.

3. For the legislative history of the Act, see H.R. REP. NO. 1434, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 5003; H.R. REP. NO. 120, 99th Cong., 1st Sess. (1985), reprinted in 1985 U.S.C.C.A.N. 132; H.R. REP. NO. 1418, 96th Cong., 2d Sess. (1980); S. REP. NO. 253, 96th Cong., 1st Sess. (1979). The EAJA thus marks a departure from the so-termed American Rule of attorney's fees under which each party to a litigation bears its own fees. See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The Act can be viewed, in part, as a response to the *Alyeska* decision, which prohibited awards in the absence of legislation to prevailing parties acting as private attorneys general. H.R. REP. NO. 1418, *supra*, at 6. The Act also followed congressional adoption of one-way fee shifting in civil rights cases. Civil Rights Attorney Fees Award Act of 1976, 42 U.S.C. § 1988.

The legislative history focused primarily on the need to provide small parties added incentive to contest governmental action. The Senate Report, for instance, asserted that "[t]he bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights." S. REP. NO. 253, *supra*, at 1; see also H.R. REP. NO. 1418,

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year,⁴ and its exposure extends to the thousands more cases each year⁵ in which private parties prevail against the government in litigation before both courts and agencies.⁶ Thus, taxpayers currently underwrite millions of dollars in EAJA fees each year to encourage monitoring and deterrence of government wrongdoing.

To prevent overdeterrence, the Act provides that private parties who prevail against the United States in any non-tort civil action⁷ may collect attorney's fees against the federal government only if the government cannot demonstrate that its position was "substantially justified." This provision has been construed to require the government to demonstrate that its position had a reasonable basis in both law and fact.⁸ The Act also precludes awards to

supra, at 5-6 ("[t]he economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity . . ."). The House Report also expressed the belief that the Act would "help[] assure that administrative decisions reflect informed deliberation. In so doing, fee shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority." H.R. REP. NO. 1418, *supra*, at 12. Finally, through fee shifting, Congress hoped to avoid injustice: "[w]here parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights." *Id.* at 10.

4. The Administrative Office reported 412 cases decided in 1990 involving the EAJA. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS (1990) [hereinafter, ANNUAL REPORT '90]; see 28 U.S.C. § 2412(d)(5) (Supp. IV 1992) ("The Attorney General shall report annually . . . the amount of fees and other expenses awarded during the preceding fiscal year . . ."). But, as discussed *infra* at text accompanying note 110, the number approaches 2000 if one includes all the cases not reported to that office. There recently have been approximately 100 fee applications annually in agency cases as reported by the Administrative Conference of the United States. REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT 2 (Oct. 1, 1989-Sept. 30, 1990), app. III, at 1 (1991). The EAJA directs the Administrative Conference of the United States to provide Congress with information about individual awards and proceedings within each agency. 5 U.S.C. § 504(e) (1988).

5. Although the government's exposure is difficult to calibrate with precision, one Senate Report estimated that the government loses about 18,000 civil cases a year. S. REP. NO. 586, 98th Cong., 2d Sess. 32 (1984) (estimating for 1983 and 1984). Fees are not available in some of those cases, and many of the prevailing parties obviously do not meet the eligibility standards in the Act. See *infra* text accompanying note 9. Nonetheless, many private parties, for any number of reasons, are not utilizing the EAJA. See generally Susan Gluck Mezey & Susan M. Olson, *Fee-Shifting and Public Policy: the Equal Access to Justice Act*, 77 *Judicature* 13, 19-20 (1993).

6. The Act covers certain agency as well as court proceedings. In 28 U.S.C. § 2412(d)(3) (1988), the Act provides that fees may be awarded "to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5." Section 504 in turn provides that an adversary adjudication is one under section 554 in which the United States' position is represented, but does not include a rate-fixing or licensing proceeding. Although proceedings before agency boards of contract appeals are not adjudications under 5 U.S.C. § 554, fees are available under the Act.

7. For instance, the Act covers challenges under the Administrative Procedure Act, claims for benefits, and defenses to penalty actions brought by the federal government. The Act also provides that any application must be filed "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1988).

8. *Pierce v. Underwood*, 487 U.S. 552, 563-68 (1988). Fees are also precluded if the court finds that "special circumstances" would make an award unjust. 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1992). Findings of special circumstances have been rare, confined primarily to instances of litigation misconduct by private parties or to instances in which eligible parties serve as surrogates for noneligible parties. See, e.g., *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219 (5th Cir. 1988).

large parties⁹ and includes a unique cap on fees which sets a maximum hourly rate—currently \$75 an hour plus cost-of-living increases¹⁰—unless the court determines that “a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”¹¹ Fees can also be awarded to private parties, notwithstanding the substantial justification of the government’s position, “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.”¹²

The Act, however, has had at most limited success in meeting the lofty goals set by Congress. In Part I, I briefly assess the incentive scheme of the Act. First, in the majority of cases, the EAJA itself does not induce private parties to challenge governmental action because sufficient incentives to litigate already exist and because the EAJA, in most contexts, provides only a weak incentive to sue. Although the Act does provide some incentive for private parties to bring small monetary claims, as well as strong claims for nonmonetary relief, the incremental increase in suits brought each year against the United States is likely modest.

Second, even though the award is paid out of the offending agency’s budget, the prospect of paying an attorney-fee award has limited deterrent impact upon the government’s primary conduct. Few agency officials consider litigation costs when crafting policy.¹³ Moreover, the government need not pay fees if it demonstrates that its position was substantially justified, and government officials, like most of us, seldom consider that their own judgment might be considered *ex post* to be unreasonable. Eliminating the substantial justification standard, which would make a fee award automatic for prevailing eligible parties, might more effectively deter the government from conduct that injures private parties, at least in contexts in which the government official is likely to consider litigation costs before acting.

In Part II, I argue that, regardless of one’s view of the efficacy of the EAJA, the expense of administering the Act should be minimized. As it stands, taxpayers must not only pay the fees of private attorneys, but also the salaries of government attorneys, support staff, judges, and agency hearing officers

9. 28 U.S.C. § 2412(d)(2)(B) (1988) (“‘party’ means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed . . .”).

10. Although agencies through rulemaking may also permit cost-of-living increases for EAJA fees in agency litigation, 5 U.S.C. § 504(c)(1) (1988), none have done so.

11. 28 U.S.C. § 2412 (d)(2)(A) (1988). Enhancements, for instance, have been awarded to counsel who specialize in environmental issues. *National Wildlife Fed’n v. FERC*, 870 F.2d 542, 547 (9th Cir. 1989). See generally *infra* text accompanying notes 169-73.

12. 28 U.S.C. § 2412(b) (1988). That waiver is tied to policies of specific statutes and therefore is outside the scope of this Article, which focuses on the desirability of general one-way fee shifting against the government.

13. See *infra* text accompanying notes 52-53.

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involved in EAJA disputes. Based in part on a study of all EAJA applications resolved during the twelve-month period from June 30, 1989 to June 30, 1990 (hereinafter, the "target year"), I conclude that the overall costs of the EAJA, as currently constituted, are indefensibly high.

Finally, in Part III, I suggest possible improvements upon the current statutory scheme. The most critical decision is whether the substantial justification standard should be retained. Given the lack of comprehensive empirical data on operation of the Act, the question of whether to repeal the EAJA, give it more teeth, or leave it untouched is perhaps close. The status quo reflects a rough compromise between those advocating more aggressive measures to check governmental overreaching and those concerned primarily with safeguarding the integrity of governmental programs and the public fisc.

However, an automatic fee-shifting approach—which would allow all eligible prevailing parties to collect fees—is compelling for claims by individuals seeking governmental benefits; such claims comprise the vast majority of all EAJA disputes. Automatic fee shifting would provide incentive for parties to bring small, strong claims that might not otherwise attract counsel. Moreover, there is greater need to deter government officials who make fact-specific judgments due to the absence of internal political checks safeguarding enforcement choices. Automatic fee shifting would also lessen the temptation of private attorneys to bypass the EAJA and collect their fees from back benefits awards to the detriment of their clients.¹⁴ At the same time, the deferential standard of review afforded individual benefits determinations minimizes the potential chilling of conscientious government action.¹⁵

In addition, the Act should be revised to minimize the costs of fee litigation. To encourage settlement, Congress should authorize an offer-of-judgment device, modeled loosely on Federal Rule of Civil Procedure 68,¹⁶ which would provide the government leverage to force settlement on the fee issues arising out of a losing case. To eliminate recurrent issues in litigation, the enhancement provision should be excised, and the cost-of-living provisions made more specific. Narrowing the scope of litigable issues under the Act should in turn promote settlement.

14. See *infra* text accompanying notes 137-45.

15. Litigants are unlikely to predict with accuracy whether courts will find the government position to be substantially justified. Courts have not construed the standard in an intuitive manner. For instance, courts have concluded that administrative action found to be arbitrary and capricious could nonetheless be considered reasonable, see *Welter v. Sullivan*, 941 F.2d 647, 676 (8th Cir. 1991) (position of Department of Health and Human Services [HHS] in denying benefits could be held substantially justified even though denial was unsupported by substantial evidence in the record); *Pullen v. Bowen*, 820 F.2d 105, 108 (4th Cir. 1987) (fact that agency position reversed for lack of substantial evidence does not mean agency position not substantially justified). Courts have also held that the government is not substantially justified even when the underlying action had originally been upheld in court. See, e.g., *Smith v. O'Halloran*, 930 F.2d 1496, 1501 (10th Cir. 1991).

16. See *infra* text accompanying notes 154-60.

I. THE THEORETICAL CASE FOR THE EAJA

In order to encourage suits and deter government wrongdoing, the EAJA adopts a one-way fee-shifting mechanism enabling private prevailing parties—defendants or plaintiffs—to recover fees against the United States. Unlike other attorney-fee statutes which shift fees to encourage suit in particular substantive areas,¹⁷ the EAJA is unique in authorizing fee shifting across a wide range of cases, including all civil actions against the United States not sounding in tort. Congress designed the EAJA as a way to equalize the litigating strength between the government and private litigants of modest means, and thereby deter government overreaching.¹⁸ Thus, both private plaintiffs and defendants are eligible for fees if they satisfy the size restrictions in the Act.¹⁹ From the perspective of the stated legislative goals,²⁰ evaluation of the EAJA turns upon (1) the need to equalize the strength of the government and private parties to encourage those private parties to contest government overreaching; (2) the efficacy of fee shifting in accomplishing that goal; (3) the need for deterrence; (4) the efficacy of fee shifting in deterring government errors in such civil contexts;²¹ and (5) the value of additional compensation for those injured by the government.

Governmental conduct, however, is not monolithic, and the need for deterrence and the efficacy of fee shifting should be assessed with an eye to the important differences among governmental actions injuring private parties. A principal distinction lies in the difference between governmental policymaking of general impact and case-specific governmental determinations, whether

17. Congress has generally authorized one-way fee shifting as an inducement to enforce specific statutory policies. *See, e.g.*, 42 U.S.C. § 1988 (Supp. III 1991) (Civil Rights Act); 42 U.S.C. § 19731(e) (1988) (Voting Rights Act); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1988) (employment discrimination); Title II of the Civil Rights Act, 42 U.S.C. § 2000a-3(b) (1988) (public accommodations law); 5 U.S.C. § 552(a)(4)(E) (1988) (Freedom of Information Act).

18. For the legislative history, see *supra* note 3.

19. Wealthy private individuals and large firms are not eligible for fee shifting because there is unlikely to be an imbalance in resources. *See supra* note 9.

20. The ABA recently stated that it supports one-way fee shifting against the federal government when “the action results in a substantial public benefit or enforces an important public right,” and “the economic interests of the party are small in comparison to the cost of effective participation or the party does not have sufficient resources to compensate counsel adequately.” ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 89-90 (1992). The ABA’s recommendation accords with the EAJA, as long as one considers civil litigation against the government to result in substantial public benefit or enforce an important public right. Even if one-way fee shifting does not induce litigation resulting in public benefit, it may ensure that an individual or business not forfeit meritorious claims merely because of a lack of resources. The ABA’s recommendation is conspicuously silent with respect to the potential for deterring government wrongdoing.

21. Deterrence may arise either from the government’s increased exposure to external review (by judges or agency hearing officers) or from its need to internalize the cost of paying fee awards. For a more thorough discussion of the incentive effects of one-way fee shifting, see Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2046-69 (1993).

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in benefits cases, contract actions, or enforcement proceedings. "Policy" suggests a rule or practice of general applicability preceded by deliberation, which is intended to set a model or guide for future conduct. In contrast, case-specific governmental action involves the implementation of a previously set policy or application of set policy to particular facts, with no necessary precedential effect. Although such a distinction may break down at the margins, much can be gained from separating governmental conduct into these two broad categories.²² While the Act may provide a modest incentive to private parties to challenge government overreaching in both contexts, only in the case-specific categories such as enforcement²³ will fee shifting possibly compel the government to internalize the costs of its wrongdoing.

A. *Equalizing the Strength of the Parties*

The government can marshal more resources in litigation than can most private noninstitutional parties. Indeed, the government's sheer size may give it an unfair advantage in litigation,²⁴ much like that which General Motors or Exxon enjoy over smaller adversaries. Private parties may not be able to afford protracted litigation against the government, as plaintiffs or defendants, because of this comparative lack of resources.

For instance, a pilot might not contest a small fine levied by the Federal Aviation Administration (FAA) in the absence of the Act. Not only might that result be unfair, but there could as well be external ramifications because other pilots may have gained from a determination that the agency erred in issuing the fine. In other words, the public benefit in challenging a governmental action may not be reflected in the stake of one particular litigant. Especially if the theory that parties with limited resources tend to be risk averse holds

22. The difference between policy and case-specific actions tracks the distinction between rulemaking and adjudication in the Administrative Procedure Act. *See* 5 U.S.C. § 551(4),(7) (1988) ("rule" means the whole or a part of any agency statement of general or particular applicability and future effect . . . 'adjudication' means agency process for the formulation of an order."). For discussion of the tenuous line between policymaking and case-specific application of law to fact, see *infra* text accompanying notes 42-51. The distinction precedes the APA. *Cf.* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (hearing not required to challenge legislative determination to increase valuation of taxable property across the board); *Londoner v. Denver*, 210 U.S. 373 (1907) (hearing required to contest assessment of tax for individuals especially benefitting from improved roads).

23. To determine whether to mete out a fine, for example, officials must decide whether a private party's conduct warrants the sanction. For a discussion of the fact-specific decisions made by the IRS, see Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 40 TAX L. REV. 411, 412-15 (1985).

24. To what extent the government actually benefits from its size advantage is not clear. Many government attorneys are overworked and devote considerably less time to individual cases than do private counsel. On any given case, there may be one government attorney against several associates and a partner in a law firm. Even when private parties cannot afford law firms, the staffing may be equivalent. Nonetheless, some private parties plainly cannot afford to litigate in the same style as the government, and they may not pursue litigation against the government vigorously because of their lack of resources.

true,²⁵ some meritorious claims will not be brought against the government, and some issues not fully aired, merely because of expected litigation costs.

Assuming this lack of parity, the question remains whether fee shifting under the EAJA restores the imbalance in resources between a private party of modest means and the government. An award of attorney's fees may provide a private party considerable incentive to challenge governmental regulation that it finds opprobrious or to defend against a governmental suit that it believes to be without merit. The impact of the EAJA is likely to be modest, however, given that many private parties have ample incentive and means to challenge or defend against wrongful government conduct regardless of the prospect of fee shifting.

Most private parties who litigate against the United States, even those falling within the eligibility provisions of the Act, would in all likelihood contest governmental action just as vigorously whether or not their attorneys' fees might be reimbursed. If the chance for recovery is significant, parties may well be able to attract counsel to pursue a monetary claim through a contingency fee arrangement.²⁶ For instance, private parties seeking social security disability benefits may contract with counsel for up to twenty-five percent of the back benefits sought.²⁷ In addition, companies satisfying the eligibility requirements under the Act that have substantial assets would likely have an incentive to challenge fines levied under the Occupational Safety and Health Act (OSHA), whether or not their attorneys' fees could be reimbursed.²⁸ Thus many, if not most, parties litigating against the government over considerable monetary stakes are able to find competent counsel to represent them.

For nonmonetary controversies as well, there still may be adequate incentive for private parties to contest governmental action. A private company may need to exonerate itself from a charge of violating a health regulation to maintain its good name and status in the business community. Or, the principle at stake—such as allowing a union to campaign on company property—may be of such obvious import to a company that monetary considerations would

25. Parties who do not frequently litigate against the government are more likely to avoid risk and uncertainty given that they do not have a large portfolio of cases over which to spread risk. Moreover, middle-income individuals may wish to avoid the possibility of a substantial loss more than someone with greater resources. *See, e.g.,* Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 139, 142 (1984) [hereinafter *Predicting the Effects*].

26. *See, e.g.,* OFFICE OF INSPECTOR GEN., *ACCESS TO ATTORNEYS SOCIAL SECURITY CLAIMANTS* (1988) (concluding that "the vast majority" of claimants under the Title II disability insurance program can obtain attorneys if they so desire because of the prospect of payment out of the back disability benefits awards).

27. 42 U.S.C. § 406(b)(1) (1988). If counsel are entitled to fees under both the Social Security Act and the EAJA, then they must refund the amount of the smaller fee to the claimant. Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183, 186.

28. Even if an affected business has few assets to devote to litigation, suits may also be brought by trade associations suing on behalf of their members to contest governmental action. *See, e.g.,* *Love v. Reilly*, 924 F.2d 1492 (9th Cir. 1991); *see also* Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 *HOFSTRA L. REV.* 307, 317 (1982).

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not be an obstacle to challenging the governmental action.

Nonetheless, there are at least three primary categories in which the EAJA should theoretically encourage suits that would not otherwise be brought. First, the prospect of attorney's fees should encourage small, strong monetary claims.²⁹ Because of the high cost of litigation, private parties may not sue if only a modest amount of money is at stake even when they have a substantial chance of winning. The smaller the claim, the greater the percentage of ultimate recovery firms or individuals need to expend on attorney's fees. A contingency fee arrangement may not suffice to ensure adequate counsel in such contexts.

Consider the situation of a claimant with a \$10,000 claim against the United States. That claim might not be brought—even if the private plaintiff estimated an eighty percent chance of success—if the attorney's fees were \$8000 or more. On the other hand, with one-way fee shifting under the EAJA, claims will be brought even if the fees exceed \$8000³⁰ as long as there is a significant chance that the fees will be shifted to the government under the Act.³¹ A risk-averse party is not likely to bring suit if it believes it has a negligible chance to collect attorney's fees, but would if it stands a fifty percent chance of recovering its own fees.

Second, fee shifting to some extent should encourage the targets of government enforcement efforts to devote greater resources to litigation. Just like plaintiffs challenging government policy, targets of governmental enforcement must decide how many resources to allocate to defending against governmental enforcement efforts. The prospect of recovering attorney's fees should instill individuals and businesses with greater resolve to contest what they believe to be governmental overreaching.

Third, the Act should similarly afford private parties an incentive to bring suit and defend themselves against government claims that cannot readily be monetized. In particular, public interest groups benefit from the EAJA³²

29. See *Predicting the Effects*, *supra* note 25, at 142; Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 747 (1988).

30. There may be some distortion because fees under the EAJA are capped at \$75 per hour plus cost-of-living increases. Congress could also provide a greater incentive through enhanced damage awards. Given congressional interest in preserving the fisc, its selection of fee shifting instead of enhanced damages as a means to encourage suits is understandable.

31. A party's decision to sue can be expressed algebraically: where p is the plaintiff's expectation of prevailing; a , plaintiff's legal fees; and x , plaintiff's estimate of judgment, then suit will be brought only when $px > a$. In the example above, the party will likely bring suit if its expected litigation costs are less than \$8000. If the party benefitted from a one-way fee shifting statute (fees can be awarded only to prevailing plaintiffs), plaintiff would bring suit where $px > (1-p)a$, since there is a substantial likelihood that the government will have to pay for the attorney's fees. Under the EAJA, $(1-p)a$ must be redefined as $(1-r)a$, where r is plaintiff's expectation of prevailing in the fee litigation.

32. Although the evidence before Congress was largely anecdotal, Congress primarily wished to aid small businesses who, either as plaintiffs or defendants, lacked the means to challenge what they perceived to be arbitrary governmental conduct. The EAJA was appended to an act to aid small businesses in general.

because there is rarely sufficient incentive for any one plaintiff to expend its own resources on behalf of the public when little material recovery is possible.³³ The availability of fees thus makes litigation more likely, at least in the absence of a well-stocked war chest. Challenges to environmental threats, for instance, might not be brought but for the possibility of fee shifting.³⁴

Yet for the EAJA to induce private parties to challenge governmental action, the private parties must be assured *ex ante* that they are likely to be able to collect fees. Private parties must not only be able to assess the strength of their claims against the United States, but also gauge whether courts on review will find that the government's position had been substantially justified. The Act, therefore, provides only a limited additional incentive for private parties to challenge perceived government wrongdoing. Nonetheless, an award of fees in some cases—even if unexpected—allows private parties to devote resources elsewhere. To that extent, the EAJA subsidizes public interest attorneys in particular,³⁵ enabling them to conduct more litigation.³⁶

In short, on a theoretical level, the EAJA furnishes an incentive primarily for private parties with relatively small disputes against the government—disappointed benefits claimants and targets of regulatory actions—to challenge the government in court. In this sense, the EAJA successfully redresses the

See, e.g., H.R. REP. NO. 1418, *supra* note 3, at 10 ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process"). *See also Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 102-03 (1981) (statement of James D. McKeivitt, National Federation of Independent Business); 125 CONG. REC. S21,435-36 (daily ed. July 31, 1979) (statements of Senators Culver and Dole). Indeed, some public interest groups like the ACLU originally opposed the Act on the ground that it might impede governmental regulatory efforts.

The congressional paradigm of a small business fighting opprobrious governmental regulation does not represent a typical EAJA case because of the prevalence of social security disability claims. Other claims are brought by individuals contesting license suspensions, fines, etc., or by public interest groups such as the Sierra Club. Ironically, steps toward deregulation in the 1980s may have undermined the need for the EAJA, at least from the perspective of many small businesses who initially supported the measure. At the same time, public interest groups began to support the Act as evidence of its use to such groups grew. Still, it is unquestionable that the EAJA currently benefits those small businesses who wish to contest continuing governmental regulation.

33. Congress can, of course, provide more direct incentives for individuals to bring suit to redress injuries suffered by the public at large by authorizing such individuals to seek fines on behalf of the public and share with the government any recovery. *See, e.g.,* 31 U.S.C. § 3730(c) (1988) (providing for qui tam actions under False Claims Act).

34. Nonetheless, fee shifting will induce few additional cases to be brought. Such a prospect is too uncertain to provide an incentive to sue unless other incentives—funding through grants, pro bono policies at law firms, or attorney preference—exist to enable the litigation to proceed.

35. Whether the EAJA is efficient as a subsidy poses a difficult question beyond the scope of this article. *See* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 449. As opposed to direct subsidies to legal aid offices, fee shifting directs subsidies only to those public interest groups who have achieved the greatest success in litigation.

36. Groups qualifying for tax-exempt status under 26 U.S.C. § 501(c)(3) cannot, however, choose to pursue litigation merely because of the potential for a monetary award if they wish to retain their status. *See* Rev. Proc. 92-59, 1992-2 C.B. 411; Rev. Proc. 75-13, 1975-1 C.B. 662.

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imbalance of resources between the government and its smaller adversaries, but only on a very modest scale. Even then, the percentage of successful suits against the government in which the original action would not have been filed (or defended) but for the Act is probably quite small.³⁷

To equalize the litigating strength of private parties and the government further, fees recoverable under the EAJA could be increased to market rates,³⁸ and the substantial justification standard could be rescinded. Those changes would provide at least somewhat greater incentive to private parties to contest governmental action in more circumstances and with greater vigor. The number of additional suits that would be filed and any increase in litigation resolve, however, is difficult to predict and impossible to measure.

B. Prospect for Deterrence

Congress presumably did not wish to encourage litigation against the United States for its own sake, but to check governmental misconduct. If the government must pay attorney's fees for litigation when the government's underlying position³⁹ is not substantially justified, then it might use more care in the future, whether in deciding to litigate or in pursuing the underlying actions affecting the interests of private parties. Indeed, because any attorney-fee award predicated on a lack of substantial justification must be paid out of the

37. Professors Schwab and Eisenberg have attempted to gauge whether passage of the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. § 1988 (Supp. III 1991), served as a significant incentive for parties to bring more civil rights actions. They concluded, based on a representative study of filing rates, that attorney's fees "play a lesser role in civil rights litigation than one might expect." Schwab and Eisenberg, *supra* note 29, at 755-59.

It is quite difficult to determine whether the EAJA, as an empirical matter, has encouraged more suits to be filed. The data collected by the Administrative Office are not specific enough to allow any reasonable inferences. From 1977 to 1978, for instance, the number of civil cases filed against the federal government increased 16%, and then another 19% the following year. After passage of the EAJA, the rate of increase in civil cases involving the government did not materially differ. Similarly, the number of government contract cases filed by private parties actually decreased after passage of the Act—more cases were filed in 1977 than in 1987 even though the number of civil cases filed against the government doubled. See the 1977 and 1987 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. In contrast, the number of social security determinations in court escalated exponentially after passage of the Act, but that increase is likely directly attributable to the government's aggressive policy of forcing beneficiaries off the social security rolls. See the 1979-1990 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. There are just too many factors, in particular the change in administration, to derive any comfort one way or another from the figures.

38. That is currently the practice under the Civil Rights Act, 42 U.S.C. § 1988 (Supp. III 1991).

39. 28 U.S.C. § 2412(d)(2)(D) (1988). Before the 1985 reenactment, many courts deemed "position" to refer to the government's position in court. See, e.g., *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). Construed in that manner, the Act deterred litigation misconduct (and misjudgment), but only indirectly the misconduct of policymakers. The congressional reenactment made it clear that the government's position is to include both the "position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based."

agency's own appropriated funds,⁴⁰ Congress hoped that the EAJA would provide the agency with considerable incentive to avoid situations in which its conduct might be assessed *ex post* to be unreasonable.⁴¹ Deterrence might stem either from the greater likelihood of judicial review, or from the government's need to pay attorney's fees if its actions are found to be unreasonable. Alternatively, a series of EAJA awards might signal Congress or the President that a particular agency requires greater supervision.

Yet, prior to determining whether fee shifting under the EAJA would encourage greater care, a critical preliminary question is to what extent such deterrence is needed. The case for deterring governmental wrongdoing through fee shifting in all non-tort civil actions is far from compelling, for there is an arsenal of political checks which constrain governmental action. In other words, the efficacy of fee shifting in deterring government wrongdoing can only be assessed in conjunction with other restraints upon the government. And, in any event, the prospect of fee shifting under the EAJA should only marginally contribute to deterring governmental misconduct.

1. *Need for Deterrence*

The EAJA is in part grounded on the congressional perception that governmental actors are inadequately deterred from misconduct by the political process, despite an intricate web of political checks, including judicial review. Governmental agencies, however, generally act only after considerable internal debate and after interested private parties have a chance to influence the process.

For instance, environmental policy regulating toxic waste dumps is usually set through notice-and-comment rulemaking, which gives agency staff and affected parties the opportunity to mold the eventual policy selected.⁴² Even in the absence of this formal process, agency policy is formulated only after considerable debate and frequently after affording interested private parties an informal opportunity to contribute to the debate. In addition, congressional committees may learn of key policy initiatives before they are implemented,

40. 28 U.S.C. § 2412(d)(4) (1988). In contrast, the government compensates parties who are eligible for fees pursuant to § 2412(b) (*see supra* text accompanying note 12) through the judgment fund. *See* Reuben B. Robertson & Mary Candace Fowler, *Recovering Attorney's Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 913-14 (1982) (hereinafter *Recovering Attorney's Fees*). In most cases, the losing agency need not absorb litigation costs, since the Department of Justice ("DOJ") serves as its litigator and costs are not apportioned to client agencies. Charging agencies for the cost of DOJ litigation might indeed promote more sensitivity to the costs of disputes with private parties, but it might also chill the agencies' willingness to contact and rely on the Department of Justice, at a cost of unified governmental policy.

41. *See supra* note 3; *see also Recovering Attorney's Fees, supra* note 40, at 945-47. Most of the other academic literature focusing on the EAJA is highly descriptive.

42. *See, e.g.,* 42 U.S.C. § 7410 (Supp. II 1990).

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and that knowledge enables Congress or its agents to gain some influence over the ultimate policy chosen. To the extent that Congress after the fact may deem that an agency has selected an unwise policy, it has the tools to force the agency to change such policy, and Congress remains at least somewhat accountable for its decisions—including whether to change agency policy—to the electorate.⁴³

Consider the facts underlying the Supreme Court's decision upholding an award of fees in *Pierce v. Underwood*.⁴⁴ There, individuals successfully sued the Department of Housing and Urban Development for its decision not to implement an "operating subsidy" program that was ostensibly authorized by Congress. The pertinent housing statute provided for three subsidy programs. While the statute provided that the Secretary was "authorized to make" payments under the operating subsidy program in question, it stated that the Secretary *shall* make the other payments. In 1974, Secretary Hills determined that, in light of the insufficient funds provided by Congress, she would allocate the available funds to the two subsidy programs she believed Congress had stressed. That decision had enormous practical significance to apartment owners as well as dwellers across the nation, and the decision was apparently reached at the highest level of the agency.⁴⁵ Even though the decision was not preceded by notice-and-comment rulemaking, interested parties had ample opportunity to lobby the Secretary before she made the decision. And because the decision had immediate ramifications, it was subject to oversight by interested committee members in Congress. Thus, while the decision may well have been incorrect, it had been substantially shaped by political forces, and the existence of such political checks minimized the likelihood of an arbitrary decision.⁴⁶

Similarly, government officials implementing previously set policy are subject to political checks, though the checks are not likely to be as effective as those confronting agency policymakers. Such government officials must determine how to apply broad policy set by Congress or other agency officials. In contrast to officials making policy choices, officials implementing policy in fact-specific contexts generally act without the benefit of participation from

43. That accountability, however, is admittedly attenuated, which is one reason that commentators have roundly condemned broad delegations of congressional authority to agencies. *See, e.g.*, JOHN H. ELY, *DEMOCRACY AND DISTRUST* 130-34 (1980); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d ed. 1979); Peter Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-37 (1982).

44. 487 U.S. 552 (1988).

45. *See* *Ross v. Community Services, Inc.*, 396 F. SUPP. 278, 285-86 (D. Md. 1975).

46. Courts have awarded fees on occasion for successful challenges to government policy in other contexts as well. *See* *Smith v. O'Halloran*, 930 F.2d 1496 (10th Cir. 1991) (awarding fees for successful challenge to Secretary's decision to promulgate "facility-oriented" enforcement system rather than patient-oriented system to ensure that hospitals operated consistent with Medicaid requirement); *Trahan v. Reagan*, 824 F.2d 96 (D.C. Cir. 1987) (awarding fees for successful challenge to IRS issuance of forms, despite the fact that issuance was preceded by substantial debate among interested agencies).

the public. Moreover, fact-specific application of policy—whether in enforcement or benefits contexts—rarely grabs Congress's eye, unless an agency targets an influential constituent.⁴⁷

For instance, consider the dispute underlying the court of appeals' award of fees in *Wilkett v. Interstate Commerce Comm'n* (ICC).⁴⁸ There, a trucking company successfully challenged the ICC's denial of its application for an expanded license. ICC officials refused the request because they had uncovered evidence that the owner had been convicted of various non-transportation-related criminal offenses, despite the fact that the owner had complied with ICC regulations fully in the past, and despite the fact that the ICC had previously considered only the company's track record of compliance in determining fitness for future service. The ICC's fact-specific determination in the case set no policy for the future,⁴⁹ attracted little congressional attention, and did not likely invite widespread participation within the agency. Irrespective of whether the action was justified, it was not checked as fully by the political process as was the decision underlying *Underwood*.

Thus, although the distinction between governmental policy and implementation decisions is at times elusive,⁵⁰ there is a greater need to deter governmental wrongdoing in contexts in which official action is not checked as fully by the political process. Most successful EAJA applications stem from what may be characterized as challenges to government implementation decisions.⁵¹

47. Some enforcement decisions, however, are prefaced by considerable debate or at least examination within the agency. There are checks within the agency in the benefits context as well. See *Mathews v. Eldridge*, 424 U.S. 319, 335-39 (1976) (describing the process by which determinations to terminate disability benefits are reached). Generally, only relatively senior agency officials have the authority to approve significant affirmative litigation. The Assistant Attorney General for the Civil Division, for instance, must approve each case filed under the False Claims Act which seeks over \$500,000. 28 C.F.R. pt. O, subpt. Y app. § 4(c)(5) (1991). Also, the General Counsel of the SEC must review all enforcement cases prior to suit. 17 C.F.R. § 200.21(a) (1991).

48. 844 F.2d 867 (D.C. Cir. 1988).

49. Indeed, it evidently could not be reconciled with prior ICC decisions. See *Wilkett v. ICC*, 710 F.2d 861 (D.C. Cir. 1983) (improper for ICC to equate fitness of trucking company with that of its proprietors).

50. Government policy has long been made not only through rulemaking and other less formal modes, but also through case-by-case enforcement actions or benefits determinations. Eligibility standards for benefits or licenses, for instance, may become clearer through elaboration in each successive agency determination, as in *Wilkett*. In addition, many agency policy determinations are unpublished, as in *Underwood*, and thus have not been tested by the formal requirements of notice-and-comment rulemaking. The more informal the policy, the closer to case-specific judgment it becomes. Even then, however, greater political checks likely constrain the agency in comparison to case-specific decisions. The generality of the policy protects against ad hoc deliberations, and the greater impact of a general policy suggests that significant ex post checks exist to correct wrongdoing.

51. Challenges to denials of government benefits provide by far the single largest category of cases. See *infra* text accompanying notes 94-95.

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2. *Effect on Deterrence*

Irrespective of the need to check governmental misconduct, there is little reason to believe that the path chosen by Congress in the EAJA will be successful. First, little deterrence can be expected to arise from the EAJA's arguable inducement to private parties to contest governmental action. Even in the absence of the EAJA, government decisionmakers recognize that the prospect of suit and external review exists. Indeed, given our litigious culture, it would be surprising if a government policymaker did not anticipate that somewhere down the line, a new policy would be challenged in a lawsuit. Moreover, there is a distinct possibility that targets of enforcement action or disappointed benefits claimants will seek review of the relevant government determinations either within the agency or in the courts. To be sure, certain policies might not be challenged in the absence of fee shifting, and some enforcement decisions might not be as vigorously contested; but because government decisionmakers will not know which policies or enforcement decisions will go unchallenged, they must consider the possibility of a lawsuit in every case. The extra inducement of litigation provided in the EAJA, therefore, is unlikely to serve as a substantial *ex ante* check upon government decisionmakers.

Second, the prospect of paying attorney's fees should act as a weak deterrent at best. Government policymakers rarely consider the possibility of attorney's fees when formulating government positions. It is myopic to think that officials at the National Highway Transportation Safety Administration (NHTSA) or the Environmental Protection Agency (EPA) consider the potential financial impact from an adverse attorney-fee award in setting seatbelt policy or effluent standards, any more than Congress would consider litigation costs in enacting broad social policy. As a general matter, policymakers do, or at least should, consider the cost-benefit justification of the policy they pursue.⁵² Yet, given the separation in most agencies between policymakers and litigators, consideration of possible attorney-fee awards is not likely to be of significant concern to policymakers. For instance, in setting car safety standards, though NHTSA must recognize the possibility of a legal challenge, it also recognizes that the Department of Justice will handle the litigation at no charge to the client agency. This is not to suggest that agency policymakers are ignorant of the fact that litigation costs the government money, only that full internalization is unlikely given that the current costs of litigation are not

52. Executive agencies, pursuant to Executive Orders 12291 and 12498, must present proposed rules to the Office of Management and Budget for review, in part to ensure that agencies have undertaken cost-benefit analyses in proposing the rules. See generally Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

quantified, let alone deemed attributable to the actions of certain agency policymakers.⁵³

Moreover, the prospect of a substantial attorney-fee award is quite remote. Few government policymakers consider it likely that their policy will be set aside upon judicial review, let alone that it could be considered *ex post* to be unreasonable.⁵⁴ Nor would policymakers necessarily be aware of whether successful challengers to government policy would qualify under the eligibility standards in the Act. In any event, an attorney-fee award is likely to be trivial, or at least quite modest, in comparison to the financial and social goals to be advanced by government-wide policy. For example, the Social Security Administration—which is the most frequent target of EAJA suits⁵⁵—pays approximately \$5 million annually in EAJA fees under a program in which billions of dollars are paid to beneficiaries each year, and in which 300,000 hearings are initiated by disappointed claimants annually.⁵⁶

An attorney-fee award simply is not likely to be an effective deterrent to government misconduct in view of the large gap in time between formulation of government policy and award of attorney's fees. Litigation challenging governmental action may span years, particularly if the court remands the case back to the agency for further consideration. Even in the absence of remands, litigation over several years is not out of the ordinary. In addition, the attorney-fee litigation may span several more years.⁵⁷ From start to finish, therefore, the challenge to governmental policy will likely last at least a couple of years, during which political administrations or at least agency personnel might change. The lessons of an attorney-fee award are likely dissipated, if not lost, with the passage of time, and they can easily be rationalized as the result of an ineffective or incompetent precursor in office.

Nonetheless, federal officials who implement policy directives by assessing the facts of each particular case are somewhat more likely to be deterred by the prospect of an attorney-fee award. The prospect of litigation costs might make the FAA pause before levying a small fine against a pilot under a novel

53. Requiring government attorneys to record their time and then collating the data to estimate litigation costs in selected cases might represent a significant step in forcing government attorneys to be more aware of the costs arising from their conduct of government litigation.

54. The Department of Justice had previously proposed an even stricter standard under which the government would have paid fees only when its position was frivolous or advanced in bad faith. H.R. REP. NO. 1418, *supra* note 3, at 7. Although the Senate rejected that proposal, it apparently selected the substantial justification standard to prevent "a chilling effect on reasonable Government enforcement efforts." S. REP. NO. 253, *supra* note 3, at 6. The House Report similarly stated that automatic fee shifting "did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper governmental enforcement efforts." H.R. REP. NO. 1418, *supra* note 3, at 13-14.

55. See *infra* text accompanying notes 94-95.

56. SSA, ANN. REP. TO CONG. 29 (1991).

57. Much attorney's fee litigation lasts longer than the underlying litigation itself. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

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theory of culpability.⁵⁸ And in general, there is less money at stake in such contexts, so the costs of enforcement are likely to be considered more fully.⁵⁹ Consider, for instance, the Department of Justice's Section on Civil Frauds. In determining whether to sue under the False Claims Act,⁶⁰ officials must not only consider the likelihood of success and potential recovery, but also the costs of litigation, in terms of government employee time and potential exposure to attorney-fee awards. It may be that the suit is so politically important (as for instance some suits against defense contractors or against former savings and loan directors) that cost is irrelevant; or it may be that the suit is necessary as a test case notwithstanding the expense. In addition, even a costly suit may be cost-effective in the long run because it may deter future false claims against the government. Nonetheless, such enforcement groups have limited funds, and the prospect of an attorney-fee award may have some added deterrent force.

Finally, the EAJA might help deter agency wrongdoing by alerting Congress or the President to a wayward agency. A series of EAJA awards might signal something amiss. Yet a signaling function can only operate if there is sufficient information available to the watchdog. Only the Department of Health and Human Services has a significant enough EAJA caseload (approximately 2000 cases a year) from which any conclusions can be drawn. In the target year, for example, the Department of the Interior was the second most active agency in court cases, losing five out of the seven fee disputes resolved.⁶¹ The Armed Services Board of Contract Appeals, which granted fourteen applications in that year,⁶² had the most active caseload arising out of agency adjudications. Such data, particularly because of the unique fact patterns among the cases, provide little grist for any oversight committee or agency. Thus, even if congressional or executive overseers would consider EAJA awards as a barometer of agency performance—an assumption which anecdotally is not borne out—the information disclosed is too patchy to be of assistance.

Some might argue that, even if the EAJA does not significantly deter careless government policy or implementation decisions, it may help deter litigation misconduct. In cases in which the private parties have prevailed or

58. Small business groups have charged that government agencies, to project the image of an aggressive watchdog, pad their enforcement record by filing actions against small companies hoping that such companies do not have the resources to defend themselves adequately. *See supra* note 32.

59. Moreover, although some enforcement actions (such as NLRB unfair labor practice charges) span as much time as challenges to agency policy, there is likely less of a time gap between the case-specific implementation of policy and the judicial resolution of any subsequent challenge.

60. 31 U.S.C. § 3730 (1988).

61. ANNUAL REPORT '90, *supra* note 4.

62. REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT: OCTOBER 1, 1989—SEPTEMBER 30, 1990 app. III, at 1 (1991).

are likely to prevail at the trial court (or agency) level, there are perhaps insufficient checks upon government litigators to prevent delay. Judgment, for instance, need not be paid until it is "final," and finality under the judgment fund statutes means when all possible remedies are exhausted.⁶³ Thus, the more protracted the litigation, the less the compensation for the private parties, and fees need not be paid until subsequent judgment under the EAJA.

Yet, predicating the EAJA on the need to police government litigation tactics is not fully satisfying. An award of fees for prevailing parties seems overbroad if all that is at stake is dilatory tactics during the litigation itself. Sanctions may be appropriate—and have been imposed—for such litigation misconduct,⁶⁴ but litigation sanctions independent of the EAJA should be sufficient.⁶⁵

As an overall means to deter government misconduct, therefore, the EAJA is quite problematic.⁶⁶ Few government policymakers are likely to be concerned with cost-benefit analysis and thus to internalize the extra costs represented by the attorney-fee award.⁶⁷ Those costs, in any event, are probably trivial in comparison to the economic or political value of the governmental policy. Furthermore, the political checks already facing most government decisionmakers diminish the need for the added deterrence of EAJA awards, particularly given the possibility of judicial review.

Still, one cannot totally discount the potential for deterrence, and the prospect of attorney's fees may have a modest deterrent impact upon those government decisionmakers who must decide how to implement government policy in fact-specific contexts, because they are more likely to assess the potential litigation costs arising from an enforcement action or denial of a government benefit. And such decisionmakers, in contrast to government

63. See 31 U.S.C. § 1304(a) (1988); 28 U.S.C. § 2414 (1989). *But cf.* Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (despite judgment fund limitations, interim attorney's fees permissible in certain situations). *Accord* Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988); see also Gregory C. Sisk, *Interim Attorney's Fees Awards Against the Federal Government*, 68 N.C. L. REV. 117 (1989) (arguing that interim awards are not permissible under the judgment fund provisions).

64. Some courts have held that sovereign immunity does not block sanctions under FED. R. CIV. P. 11 & 37. See, e.g., Mattingly v. United States, 939 F.2d 816 (9th Cir. 1991); United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988).

65. Indeed, the EAJA formerly accomplished that goal more narrowly when the "position of the United States" was interpreted to refer to the government's position (and thus its conduct) in the litigation itself. See, e.g., Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). Fees could be awarded, not if the underlying action was arbitrary, but if the government's litigation tactics were suspect. See also *supra* note 39. In reenacting the Act in 1985, Congress clarified that it was more concerned with the underlying government conduct. 28 U.S.C. § 2412(d)(2)(D) (1988). See generally H.R. REP. NO. 992, 98th Cong., 2d Sess. 6, 11 (1984).

66. Taxpayer dollars might be more effectively allocated elsewhere if monitoring governmental wrongdoing is the predominant goal of the Act. Some have suggested, for instance, that additional training of government employees or additional congressional inquiries following on the heels of government wrongdoing might help deter subsequent wrongdoing. See PETER H. SCHUCK, *SUING THE GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

67. See *supra* text accompanying notes 52-53.

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officials formulating general policy, face comparably fewer internal checks prior to reaching their fact-specific decisions. Just as the EAJA provides incentive principally to those involved in discrete disputes with the government (whether over benefits or nonmonetary stakes), so it achieves the greatest deterrence in the same set of cases.

Rescinding the substantial justification standard would marginally increase deterrence of future errors by subjecting the government to attorney-fee awards in all cases in which a private eligible party prevails. In the absence of the substantial justification standard, government decisionmakers might more readily consider the prospect of a fee award before acting, and the government's exposure to fees would increase. Similarly, elevating the fee cap could augment deterrence slightly by forcing the government more fully to internalize the costs of its wrongdoing, but the same structural impediments to more effective monitoring remain.

Even if the substantial justification standard were rescinded, however, the EAJA would not likely result in overdetering governmental activity. The impact on deterrence—which is marginal at best under the current Act⁶⁸—would only slightly increase. Policymakers would still not likely consider the prospect of fees before acting, and governmental agencies that do not internalize litigation costs would not be affected.

Moreover, there is less risk of overdetering government agencies when their actions are protected by a deferential standard of review. Standards such as “substantial evidence in the record” or “arbitrary and capricious” create

68. The \$75-per-hour maximum, even when expanded to account for the increased cost of living, is hardly sufficient to overencourage suit. Furthermore, in contrast to insurance companies or other repeat players in the private sector, the government will not likely settle weak cases for their nuisance value. The government has less incentive to settle than do such private parties because of political considerations against giving windfalls to undeserving claimants, and because the government does not consider litigation costs as fully.

Indeed, awards under the EAJA have been substantially lower than the Justice Department originally projected. The Department, as well as the Congressional Budget Office, estimated that the Act would cost taxpayers \$92 million for each of the fiscal years 1982-1984. H.R. REP. NO. 1418, *supra* note 3, at 20-21 (1980). In contrast, the Administrative Office and Administrative Conference together have reported payouts of only several million dollars a year. *See infra* text accompanying notes 101-15. This figure does not even come close to that originally projected, even if those agencies understate the amount that has been paid.

There should be little fear of overdetering government litigators. Attorneys would recognize that novel jurisdictional or statutory arguments come at a price, namely that unsuccessful arguments raise the amount of attorney's fees paid to prevailing private parties. Yet, if the amount or principle at stake in the litigation is significant enough, and the arguments are plausible, government attorneys should have ample incentive to litigate as vigorously as possible. Government attorneys could also protect themselves by launching such new arguments in cases in which they stand little chance of paying EAJA fees, either when the private party does not satisfy the eligibility criteria in the Act, or when the government stands an excellent chance of winning on other grounds. The burden of defending against such arguments would not, therefore, rest on the shoulders of prevailing private parties of modest means. In any event, government litigators in the fee litigation currently face similar risks, due to the prevailing parties' entitlement to fees for successful fee litigation, irrespective of the reasonableness of the government's arguments opposing the fee award. *See infra* text accompanying notes 92-93. That disincentive seemingly has not chilled governmental litigation efforts under the EAJA.

a safe harbor for agency officials implementing policy at the outskirts of their authority. Officials who recognize that their decisions will be sustained by substantial evidence in the record will not readily be overdeterred by the prospect of fees because of the margin of safety created by the deferential standard.

In addition, to the extent the underlying liability standard incorporates a measure of wrongdoing, there is less likely to be overdeterrence. For instance, agency officials awarding benefits may not take into account the political affiliation of the claimants. A successful challenge to a denial of a claim hinges upon proof of impermissible motivation by the agency. Because agency officials should never consider the political affiliation of a claimant, the prospect of fee liability will not likely hinder their actions in determining eligibility on the basis of recognized criteria. In other words, there is at times little reason to encourage agency actions at the margins of the law.⁶⁹

The potential for overdeterrence thus varies in each context in which the EAJA applies. The risk of overdeterrence is greatest when the government's underlying liability is predicated on conduct that is not clearly "wrongful" and that is not protected by any deferential standard of review. Enforcement actions provide an example—courts must decide not whether the government acted wrongfully in bringing suit, but whether all provisions in the Act were satisfied.⁷⁰ Nonetheless, government officials may have sufficient nonmonetary incentives in bringing enforcement actions or contract claims to negate the potential for overdeterrence. Such government officials would realize that, even if there is a risk of paying fees when trying to set new precedent, overturn old precedent, or set an example for other private parties, those goals should be well worth the modest price. Thus, one-way fee shifting under the EAJA, even if converted to an automatic fee-shifting system, will unlikely chill government initiative.⁷¹

69. A study by the General Accounting Office (GAO) found that the Social Security Administration consistently approves a smaller proportion of applications for disability benefits from blacks than whites. See Spencer Rich, *Denial of Benefits to Blacks May Signal Bias, GAO Says*, WASH. POST, May 12, 1992, at A17.

70. DOJ officials contesting false claims against the government, however, are not protected by any fault standard—the claim depends only upon whether the evidence satisfies the statutory standards, and a reasonable construction of the statute or of the facts of the case does not ensure success. See, e.g., *Crandon v. United States*, 494 U.S. 152 (1990) (rejecting government suit to recover for false claims despite plausible reading of statute); see also *United States v. Boeing Co.*, 747 F. Supp. 319 (E.D. Va. 1990) (awarding private party's EAJA claim in same case), *rev'd*, 957 F.2d 1161 (4th Cir. 1992).

71. If the EAJA were applied more broadly to include all agency proceedings, a different type of overdeterrence might ensue. Many agency proceedings are informal, reflecting a more magisterial than adversarial approach. In disability determinations before administrative law judges (ALJs), for instance, there is no attorney representing the position of the Secretary. To apply the EAJA to such proceedings could change the nature of the proceedings significantly, because the government logically would treat the proceedings more like trials to limit its exposure to attorney's fees. For instance, the government might prevent the claimant from introducing new evidence at a hearing to restrict her chance to prevail. Thus, the current line between adversarial and nonadversarial adjudications in the EAJA makes sense to preserve the integrity of informal agency processes.

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C. Compensation Mechanism

Although the legislative history of the EAJA focuses on the need both to encourage private parties to litigate against the government and to deter government overreaching,⁷² the EAJA arguably serves the related function of compensating some parties more for the losses they sustain at the government's hands. There is undeniably normative appeal in providing that those injured by the government receive complete compensation for their injuries, including litigation expense. To many, compensation for injuries cannot be complete if a substantial part of the recovery must then be devoted to pay an attorney.⁷³ A prevailing party should recover attorney's fees as well as medical bills.

Yet, the EAJA as a whole cannot easily be rationalized as a compensation mechanism. First, the EAJA primarily provides additional compensation in contexts in which the government has previously waived immunity for the underlying claim. (Additional compensation is also provided when the government is the moving party.) Given that many individuals and businesses cannot recover against the United States at all because of the government's refusal to waive sovereign immunity,⁷⁴ the case for compensating those who have already prevailed against the government—and likely received some redress—is far from compelling.

Second, the narrow scope of the EAJA is inconsistent with a general compensation goal because so many disputes, including tort and most immigration suits, are excluded from coverage.⁷⁵ Those receiving additional compensation under the Act, in other words, are not clearly more “deserving” than those who do not.

Third, compensation under the EAJA extends only to those satisfying the eligibility standards in the Act.⁷⁶ Wealthy private litigants cannot obtain fees

Recognition of the necessity of a line, however, does not shed light on the current controversy over where to place the line. The Supreme Court recently concluded that only agency proceedings technically governed by 5 U.S.C. § 554 (1988) fall within the scope of the Act, even if the agency by statute is required to utilize the same procedures as under § 554. *Ardestani v. INS*, 112 S. Ct. 515 (1991) (relying in part on canon of strictly construing waivers of sovereign immunity to conclude that immigration proceedings are not covered because they are not “under” § 554). If Congress is convinced of the Act's success, then it should consider, on a category-by-category basis, whether to extend the Act to proceedings required by statute which are substantially similar to those under § 554.

72. See *supra* text accompanying note 3.

73. See, e.g., Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 792-94 (1966); Calvin A. Kuenzel, *Attorney's Fees in a Responsible Society*, 14 STETSON L. REV. 283, 286-89 (1985); John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 442-44 (1986).

74. See, e.g., *United States v. Smith*, 499 U.S. 160 (1991) (denying recovery for malpractice claim arising overseas).

75. See, e.g., *Ardestani v. INS*, 112 S. Ct. 515 (1991) (excluding deportation proceedings); 28 U.S.C. § 2412(d)(1)(A) (1988) (excluding tort suits).

76. See *supra* note 9.

even when the government's position is not substantially justified. Large parties, just like smaller ones, arguably deserve compensation if they are injured by government misconduct.

Finally, fees cannot be recovered by small parties when the government can demonstrate that its position was substantially justified. The substantial justification of the government's actions does not necessarily preclude the case for compensation, given that the government, irrespective of that finding, might have been at fault,⁷⁷ or might have enjoyed the benefit of monies erroneously withheld. Moreover, some commentators dispute whether compensation is considered just only when the party inflicting the harm is at fault.⁷⁸

Nonetheless, the EAJA may serve a salutary function in creating the appearance of fairness. Some may believe that injuries at the hands of government officials are somehow "worse" than those received at the hands of private parties, presumably because of the breach of public trust involved. Through one-way fee shifting, Congress may seek to restore the public's faith in government, pledging more complete compensation for any injuries suffered or for unreasonable regulatory efforts. The incompleteness of the EAJA as a compensation mechanism does not necessarily undermine its utility as a means of bonding the government more closely to its citizens. Such intangible benefits cannot be quantified, however, for it is quite difficult to gauge the extent to which the EAJA has contributed to a greater sense of wellbeing among small regulated businesses or private individuals. Nor is it clear how to measure any benefit against the costs to the taxpayer.

In short, the EAJA as currently constituted serves an amalgam of functions, with mixed results. The Act attempts to equalize the strength of the parties, and succeeds at the margins; it possibly deters government wrongdoing, but not at the policy level; and it serves to compensate more completely only some victims of government misconduct.

II. COSTS OF EAJA LITIGATION

Although the EAJA's record in encouraging more vigorous litigation against the United States, deterring government overreaching, and compensating those injured at the government's hands may be uncertain, its costs are quite palpable. One-way fee shifting under the EAJA increases the burden on the taxpayer in a number of ways. First, the EAJA adds a new layer of costs

77. The government's actions, for instance, may lack substantial evidence and yet be considered substantially justified. In other words, there may be several levels of fault, with substantial justification reflecting greater fault than a lack of substantial evidence.

78. See, e.g., Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 695-700 (1992) (arguing that under Aristotle's conception, unjust losses as well as unjust acts give rise to a duty to compensate).

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by introducing an additional round of litigation that generates more fees for government and private attorneys, and more adjudicative expense in courts and agencies. Although the government has defeated some large fee requests on the ground that its position had been substantially justified,⁷⁹ litigation over that standard in other cases has cost the government almost as much money as it has saved.⁸⁰ Second, the potential for fee shifting, in comparison to the American Rule under which parties bear their own litigation costs, makes settlement of the underlying action more difficult to accomplish, and thereby increases expenses the taxpayer must foot for the initial litigation with the government. As discussed below, repeal of the substantial justification standard would likely facilitate settlement of both the underlying case and the fee dispute.

A. Litigation Costs

1. Fee Litigation

The EAJA—in no small part due to the substantial justification standard—has significant impact in increasing overall litigation costs. Fee disputes are notorious for their complexity. The Supreme Court has decried the tendency for fee litigation to dwarf the underlying dispute between private litigants and the government,⁸¹ resulting in, as Justice Brennan noted, socially unproductive litigation, “which like a Frankenstein’s monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake.”⁸² The EAJA thus adds substantial costs to government litigation, even aside from the possible impact on settlement of the underlying dispute, by increasing government attorney time and private attorney time that must be compensated by the government,⁸³ and the time of adjudicators in both the judiciary and agencies that also must ultimately be paid for by the taxpayer.

Consider *In re Wiley Prentice*,⁸⁴ a relatively run-of-the mill EAJA case arising out of a civil penalty action brought by the Department of Agriculture under the Plant Quarantine Act.⁸⁵ An airline pilot successfully challenged a

79. During the target year, for instance, the government demonstrated that its position had been substantially justified to defeat an EAJA request for \$233,804, ANNUAL REPORT ‘90, *supra* note 4, at 36. (1990). The year before it defeated a request for over \$500,000. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 99 (1989) [hereinafter, ANNUAL REPORT ‘89].

80. See *infra* text accompanying notes 101-14.

81. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

82. *Id.* at 455 (Brennan, J., dissenting).

83. In addition, private attorney time that is not compensated by the government can be considered socially unproductive.

84. P.Q. No. 161 (Oct. 27, 1988).

85. 7 U.S.C. §§ 151-167 (1988).

penalty imposed because of his failure to bring his luggage to the appropriate area for agricultural inspection. He argued, and the agency adjudicators finally agreed, that the pertinent regulations governing inspection of luggage and personal effects could not conceivably cover his conduct because he ultimately presented his luggage for inspection after being paged. The pilot subsequently filed a fee application under the EAJA for approximately \$6500. Agency attorneys contested the application, arguing both that the rate requested was excessive, and that the agency had been substantially justified in bringing the civil penalty action. At the end of the proceedings, the hearing officer determined that the agency had not been substantially justified but reduced the award of fees by roughly twenty-five percent, for an award of slightly under \$5000. So far, so good. The question from the agency's perspective should be whether the \$1500 saved was cost-effective given the government's expenses, paying fees on fees (fees paid to prevailing parties for work on the fee case), compensating its own attorneys and staff in contesting the EAJA application, and absorbing the costs incurred by the agency hearing officer and support staff. The government unquestionably prevails in some EAJA litigation, and that litigation presumably deters inflated claims in future EAJA cases. Yet, it is undeniable that defending against EAJA requests requires significant resources that could be better utilized elsewhere. No accurate gauge of the overall amount of time spent on EAJA requests can be made because government attorneys rarely record their hours expended in litigation.

In the particular Department of Agriculture case, however, agency officials did record the amount of time expended on the case.⁸⁶ Combining hours recorded by government attorneys in fighting the EAJA application (50 hours + 18 hours for support staff) and the hours recorded by the hearing officer (40 hours + 16 hours for support staff) and then by the agency head on review (20 hours + 8 hours for support staff) suggests that the government as a whole expended more in fighting the fee application than was originally sought in the case. Indeed, there was no report of whether the agency paid the private attorney fees on fees, which would have increased the government's expenditures even more. Thus, taxpayers expended roughly \$9000⁸⁷ in saving \$1500 in EAJA fees, when the most that could have been saved was \$6500. Perhaps there were non-financial considerations in litigating the EAJA case, but it appears almost irrelevant that the government successfully reduced the fees paid because it was doomed to lose financially from the outset.

86. The Administrative Conference requests that agency officials record such data, although even a cursory inspection of the Conference's files reveals that the request is often ignored.

87. As a rough measure, I used \$75 per hour for the salaries and fringe benefits of government litigators and hearing officers, including overhead, and \$20 per hour for support staff. In cases in which the government has recovered its fees from a private party as a part of Rule 11 sanctions, courts have calculated fees by reference to market rates, and not actual cost. *See, e.g., Harris v. Marsh*, 679 F. Supp. 1204, 1331-32 (E.D.N.C. 1987), *rev'd in part*, 914 F.2d 525 (4th Cir. 1990).

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The *In re Wiley Prentice* case could be viewed as atypical,⁸⁸ but it suggests a more important point, namely, that there are significant hidden costs in EAJA litigation. Costs include government attorney time⁸⁹ and that of adjudicators in agencies and on the bench.

The substantial justification standard in effect requires parties to relitigate their underlying dispute. Eligible parties must demonstrate to the judge or hearing officer that the government was not only wrong in the underlying litigation, but that it was inexcusably wrong. To make that showing, private parties must analyze all the legal questions and factual disputes anew in an effort to persuade the decisionmaker of the government's lack of substantial justification. At times, fresh research by both sides is required to determine whether, in light of prior precedents, the government was justified in asserting the position that it did. At other times, research can reveal whether the government should have known not to rely on a discredited witness or statistical study.

In assessing the costs of the EAJA, therefore, it is insufficient to factor in

88. Yet there are other instances. The U.S. Army Corps of Engineers' unsuccessful effort to combat fees in *Golden Gate Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 732 F. Supp. 1014 (N.D. Cal. 1989), provides an apt illustration. The prevailing plaintiffs originally requested \$43,420 in fees after the court determined that the government had not been substantially justified. *Id.* at 1022 n.12. Government attorneys nonetheless challenged the reasonableness of hours expended by their adversaries prior to filing the complaint and in the summary judgment motion, and argued that some work was non-productive and duplicative. As the district court remarked,

Ironically, that portion of plaintiffs' current claim *not* challenged by federal defendants amounts to \$34,012, nearly 80% of the original claim. Thus, in retrospect, it appears that by intensively litigating the fee petition, federal defendants caused plaintiffs to incur approximately \$31,000 in additional expenses (to say nothing of the significant portions of defendants' *and* the court's time that were also consumed) in order to potentially save approximately \$9,408.

Id. For purposes of the study, government attorneys estimated that they expended 60 hours litigating the fee issues, though that figure appears extremely low given the briefs and hearings involved. *See also* *Trichilo v. Sec. of Health and Human Servs.*, 832 F.2d 743 (2d Cir. 1987) (involving award to plaintiff of over \$10,000 in attorney's fees to cover fee claim under \$1000.)

Although the study suggests that government litigators at times make shortsighted litigation decisions in combatting EAJA applications, other efforts have been justified from a cost-benefit perspective. *See infra* text accompanying note 102.

89. Consider as well the efforts of government attorneys in the DOJ Civil Division who contest EAJA applications. The Civil Division, a litigating force of some 500 attorneys, is responsible for all tort, contract, and agency litigation involving the government, with the exception of antitrust, tax, and some specialized agency cases. Most EAJA litigation is conducted outside of the DOJ by agency staff in conjunction with Assistant United States Attorneys. For instance, 15 cases decided in the target year were handled by DOJ attorneys out of the more than 400 reported to the Administrative Office of U.S. Courts, and only 10 were supervised or litigated by the Civil Division. Because litigating attorneys in the DOJ are now required to record time spent on various cases (even though their reporting duties are in no way policed and are often honored in the breach), some approximation of the government attorney resources expended in EAJA litigation is possible. During the target year, over 4500 hours of attorney time were recorded on EAJA matters in the Civil Division (not limited to the cases resolved during that year). This figure excludes most of the time expended by supervisors within the Division's various branches. While DOJ officials state that these statistics considerably underestimate hours actually expended, they still represent more than the full workload of two attorneys. Nor do these hours include the efforts of attorneys from the DOJ's client agencies. These attorneys assist the DOJ in handling EAJA and other cases arising out of their agencies.

only the cost of payments to private attorneys. In the absence of the EAJA, fewer government attorneys would theoretically be required or, as is more likely, government attorneys would be shifted to work on issues of possibly greater social importance. Moreover, the burden on the federal judiciary would be lightened somewhat, and the workload of agency hearing officers would correspondingly diminish. From the taxpayer's perspective, the uncertain benefits of the EAJA in general must be assessed against the backdrop of increased litigation costs.

2. Empirical Data

To gauge the current costs of the EAJA, I conducted a study of the costs associated with disposition of all EAJA applications resolved from June 30, 1989 to June 30, 1990. I selected that time period because it was the most recent available following the Supreme Court's decision in *Pierce v. Underwood*,⁹⁰ which held that the substantial justification standard was essentially one of reasonableness, and that appellate courts should defer to the trial courts' findings on that issue.⁹¹ Within that period, the Court issued its decision in *Commissioner, INS v. Jean*,⁹² holding that the EAJA requires the government to pay the private party's fees for litigating fee issues whenever the government cannot bear its burden of demonstrating substantial justification for the underlying litigation. The decision in *Jean* should have paved the way for a modest increase in the amount of attorney's fees awarded. Accordingly, I would expect the fees on fees paid by the government to increase in future years, barring an increased rate of settlement.⁹³

By statute, the Administrative Office of United States Courts ("AO" or "Administrative Office") collects all EAJA decisions resolved by Article III tribunals. The reporting scheme, however, is predicated on the willingness of court clerks to transmit the pertinent information (on provided forms) to the Administrative Office. The AO reported 412 decisions for the relevant time period, and over ninety percent of the reported cases involved social security

90. 487 U.S. 552 (1988).

91. *Id.* at 564. Although I did not study the number of appellate decisions preceding and following *Underwood*, evidence compiled by the Administrative Office confirms that there have been somewhat fewer appeals in recent years. In 1988, the Administrative Office reported that 67 EAJA decisions were issued by appellate courts. Appellate courts issued 54 decisions the next year. Annual Report '89, *supra* note 79, at 98. In contrast, information supplied to the Administrative Office reveals that only 16 appellate decisions were issued during the target year. ANNUAL REPORT '90, *supra* note 4, at 35.

92. 496 U.S. 154, 158-62 (1990).

93. I was surprised to learn in the study that some parties who successfully obtained fees under the EAJA did not file for fees on fees, either because of oversight or because the amount at stake was not worth the "hassle" of filing for the fees.

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claims.⁹⁴ Some caution is in order, however. No decisions, for instance, were received from district courts in California or Texas, nor from the Southern District of New York. In fact, the Administrative Office report itself reveals that applications from four districts—New Jersey, Northern Iowa, Western New York, and Western Louisiana—accounted for forty percent of all dispositions.⁹⁵ The number of decisions and amount of money reported, therefore, underestimate the correct figures.

To supplement the cases reported, I checked all decisions reported during the relevant time period in attorney-fee reporters and on the computer networks. A number of decisions were found in that manner, including several in jurisdictions which did not report any cases to the Administrative Office. But those services do not report all EAJA applications arising out of social security claims. To get that number, I requested and ultimately received data from the Social Security Administration (SSA) reporting all EAJA applications resolved during the target year which arose out of individual benefits cases. SSA's figures, which include settled cases, dwarf the numbers reported to the Administrative Office.

Another pool of cases consisted of agency EAJA determinations that, by law, are to be reported to the Administrative Conference of the United States. I collected data on cases resolved during the relevant time period, recognizing that a number of agency determinations were probably not reported. The two Administrative Conference reports encompassing the target year establish at least a fair approximation of the number of decisions and amount of money paid during that year.

The primary object of the study was to determine the financial significance of litigation over the substantial justification standard in cases resolved during the target year and, secondarily, to approximate the litigation costs involved in EAJA disputes. I hoped to calculate the percentage of cases in which the fee application was denied due to a finding that the government's position was substantially justified, the potential EAJA fees saved by the government in such cases, the amount of fees on fees paid and, finally, a rough approximation of the amount of government attorney time expended defending against EAJA applications.⁹⁶ I contacted attorneys involved in every case not involving

94. In each category, there may be a problem of unreported settled cases. Anecdotal evidence suggests that the proportion of settled unreported cases was quite low. All the settled cases arising out of social security disability litigation were reported by the SSA because of its centralized payment office.

95. The Administrative Conference reports cases decided from October 1 through September 30 of the following year.

96. Calculating judicial cost is extremely difficult. See JAMES S. KAKALIK & RANDY C. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM, COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES 21-80 (1983); JAMES S. KAKALIK & ABBY E. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM, COURT EXPENDITURES FOR PROCESSING TORT CASES 36-51 (1982). Some courts have estimated that each hour of judicial consideration costs the taxpayer \$600. See *Harris v. Marsh*, 679 F. Supp. 1204, 1324-25 (E.D.N.C. 1987), *rev'd in part sub nom. Blue v. Harris*, 914 F.2d 525 (4th Cir. 1990).

social security litigation. Moreover, I took a statistical sampling based on a random number table⁹⁷ of all individual benefits cases reported to the Administrative Office.⁹⁸ Over one-half of the private attorneys responded, generating usable (if approximate) data for those cases (Table 1). The data were sketchiest with respect to the amount of fees awarded for the fee litigation itself. Many private attorneys either had not kept accurate records or were unwilling to sort through their records to ascertain a separate amount. Moreover, it was not possible to piece together how many of those hours were devoted to litigating

Table 1: Data for Survey Period

	Court	Agency	HHS
Number of Cases	20	28	50
Mean Hours of Private Counsel in Fee Dispute	64.1	74.1	5.0
Mean EAJA Request	\$35,798.15	\$96,305.08	n/a
Mean Award	\$21,691.70	\$41,963.31	\$4,536.60
Percentage of EAJA Cases Won By Private Party	70%	73%	84%
Percentage of EAJA Cases Lost Due to Substantial Justification Finding	20%	18%	16%
Maximum Percentage of Total EAJA Requests Lost Due To Substantial Justification Finding	38%*	2%	12%

**The 38% figure is largely attributable to one large case in which fees were denied because the government's position was substantially justified.*

97. Use of a random number table should lead to a representative sampling, even though some jurisdictions did not report EAJA cases to the Administrative Office. In my review, EAJA applications arising from social security litigation did not vary significantly from region to region, except for the procedures by which they were resolved.

98. To some extent, that focus was dictated by the fact that it took so long to obtain the data from the Social Security Administration, and that the SSA data did not include names of either the private or government attorneys involved. In any event, the size of social security claims in both groups was similar, as was the percentage of cases in which fees were awarded (85%). The failure to report to the Administrative Office appears largely due to the unwillingness of court clerks to cooperate with that office, and that factor should not skew the representativeness of the cases that were in fact reported. It is also possible that some court clerks did not report data on settled cases, even though those settlements must generally be approved by the courts before SSA will pay the award.

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the substantial justification issue, although counsel attributed the bulk of the research to litigation over that issue.⁹⁹

In comparison, the government response overall was quite limited. Too few government attorneys keep track of their time to make study of government time meaningful. Nonetheless, some government attorneys record their time on particular cases, either because of an agency requirement, as at the Department of Justice, or because of personal interest. With the data received, government attorney time could be assessed in at least a fraction of the cases. Tables were generated from the information available in non-social security court cases, social security individual benefits cases, and agency cases (see Tables 2-5), even though the statistical representativeness of the sample is unclear.¹⁰⁰ As with information obtained from private attorneys, it was impossible to attribute what percentage of government attorney time was devoted to demonstrating the substantial justification of the government's position. At least in all cases not involving individual benefits claims, however, the issue of substantial justification was litigated in every case and, judging from anecdotes, generally received the most focus from the government (as well as private) litigators.

a. EAJA applications in court not arising from individual benefits claims.

For the target year, the Administrative Office reported 412 EAJA applications resolved, of which twenty-seven, or seven percent, did not arise out of social security individual benefits litigation. Of those twenty-seven cases, fees were granted in twenty-one cases,¹⁰¹ and the government's defense of substantial justification was dispositive in four of the five denials¹⁰² for which I received data.¹⁰³ The median award in this group of twenty-one cases was approximately \$40,000,¹⁰⁴ and the mean award was slightly more, at \$48,000. The

99. Disputes over the reasonableness of hours, in contrast, generally require less research.

100. There was obviously self-selection, but the way that may have skewed the data is unknown.

101. Those fee awards were not necessarily paid, however, because EAJA decisions are subject to further review.

102. The Administrative Office reported the sixth denial as an application against the Department of Energy seeking \$267,476 in fees. ANNUAL REPORT '90, *supra* note 4, at 36.

103. Roughly 20% of the cases, in other words, were denied because the government's position was substantially justified. That figure was similar in the preceding year, but significantly larger in the year before.

Fees can be denied for other reasons besides the substantial justification of the government's position. The Administrative Office reported that of the 41 applications denied that year (including social security cases), only 26 were denied because of the government's claim of substantial justification. ANNUAL REPORT '90, *supra* note 4, at 38. Others were denied, for instance, because of the lack of timely filing or because the applicant was not a prevailing party. During the preceding year, only one-half of all denials rested on a finding of substantial justification. ANNUAL REPORT '89, *supra* note 79, at 101.

104. The figures reported to the Administrative Office and Administrative Conference include expenses such as photocopying costs and expert witness fees. Those expenses were so minimal in relation to the amount of fees paid that I have ignored them for the purposes of this study. For instance, the Administrative Office reported that, in the target year, \$40,227 were awarded in expenses in comparison to the \$2,179,350 granted overall. ANNUAL REPORT '90, *supra* note 4, at 35.

difference between the median award and mean award was probably less this year than in most, because there was only one award in excess of \$200,000.¹⁰⁵

Within this group of twenty-seven cases, I received relatively complete data on only four cases (Table 2). The government lost in all four cases, and the total amount awarded was \$108,931. In litigating the cases, the private parties collected \$20,717 in fees on fees, and government attorneys recorded an

Table 2: Court Cases

Number of Cases	4
Mean Private Hours Recorded in Fee Dispute	56.4
Mean Government Hours Recorded in Fee Dispute	72.0
Mean EAJA Award	\$27,233.33
Mean Fee on EAJA Award	\$5,179.44
Chance of Private Side Winning	100%

estimated 288 hours of work, which would amount to roughly the same amount of money if calculated at seventy-five dollars an hour.¹⁰⁶ The government attorney time was significantly understated, given that the efforts of client agencies were not included in the hours recorded. Obviously, litigating the substantial justification issue in these four cases was to no avail, and cost the taxpayer considerable money without even considering the judicial resources expended. In this group of cases, litigation expense on the fee applications approximated forty percent of the amount of fees originally claimed by the private prevailing party, not counting the unrecorded time of attorneys from the client agency.¹⁰⁷ Although the government did save considerable money in litigating the substantial justification issue in several large cases for which I did not receive government attorney time, the amount saved represents only

105. Greater awards would skew calculation of the mean. In comparison, the Justice Department recently settled an EAJA application for over \$1 million. The case arose out of a successful challenge to INS policy with respect to Haitian refugees. *Jean v. McNary*, No. 81-1260 (S.D. Fla. Feb. 25, 1991) (\$1.7 million).

106. Government attorneys make less than \$75 an hour, but the \$75 estimate includes overhead and benefits. Similarly, the billing rate of attorneys in private firms is greatly in excess of the compensation paid to those same individuals.

107. In the four cases, the total amount claimed was \$117,376. The parties evidently included in that amount sums ultimately requested (and subsequently granted) for work on the fee applications. Thus, the percentage of litigation expense in the sample actually exceeds 40% of the amount originally claimed. That percentage, though high, is not startling, given that preliminary research suggests that the legal fees of both sides taken together in small cases may often exceed recovery by a plaintiff. David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 121 (1983).

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a modest percentage of the amount awarded overall. Approximately fifteen percent of the \$1.7 million sought in those twenty-seven cases was saved by virtue of the substantial justification defense,¹⁰⁸ and some of those fees might have been disallowed for other reasons. Given the government's relatively low success rate, eliminating the substantial justification standard would not have increased the government's exposure appreciably in this group of cases. As mentioned previously, the substantial justification standard might nonetheless serve as a critical filter preventing other cases from being filed.

Furthermore, the amount of fees requested in these four cases was \$117,376, of which \$108,931 was awarded. Even with respect to the reasonableness of the fees requested, therefore, the government arguably did not act in a cost-effective way—putting to the side the possible deterrent effect of vigorously contesting the amount of fees. The government presumably expended more in litigation than the \$9000 saved. Though not as dramatically, the Administrative Office figures bear out this relationship. In the twenty-one cases in which a total of \$1 million was awarded, only \$1,187,624 was initially claimed. Thus, the modest reduction in attorney's fees was to a large extent offset by the need to pay government attorneys' salaries and the need to pay fees on fees. Government efforts were plainly cost-effective in contesting only the several large fee applications presented—litigating the vast majority of remaining cases, at least in retrospect, appears wasteful.

b. *EAJA applications arising from individual benefits claims.* There are two sets of data with respect to individual benefits cases administered by the Social Security Administration. First, the Administrative Office reported applications for EAJA fees in 385 social security cases, of which 350 were granted, or ninety-one percent of the total. For those 350 cases, the amount claimed was \$1,300,005, and the amount awarded was \$1,171,075. The amount saved in the thirty-five cases was \$160,947, some of which can be attributed to the court's determination that the government's position was substantially justified. The percentage of applications denied by virtue of the substantial justification defense was less than ten percent.¹⁰⁹ The mean award was \$3346, which was probably close to the median, given that there are few, if any, huge awards in individual benefits cases.

The more complete data submitted by the Social Security Administration were quite similar. There were 2007 applications for fees resolved, with 1700

108. If, in the one case for which I did not receive data, the court denied fees on the ground that the government was substantially justified, then the percentage saved by virtue of litigating the substantial justification issue would double.

109. HHS also successfully challenged fee applications on other grounds, such as because of their lack of timeliness or because the private party had not prevailed.

granted, or roughly eighty-five percent of the total.¹¹⁰ Of the applications granted, the mean request was \$3584, and the mean award was \$3244. Of the applications denied, the average request was \$2867. The total amount potentially saved by litigating the substantial justification issue was obviously quite modest, putting to the side again the question of deterring additional claims.

I received relatively complete data on fourteen HHS EAJA applications arising out of individual benefits claims (Table 3). The private party prevailed in thirteen cases, which departs only slightly from the overall average in such cases.¹¹¹ In those thirteen cases, courts awarded (through approval of settlements or after litigation) a total of \$59,335, for a mean award of \$4564,

Table 3: Individual Benefits Cases

Number of Cases	14
Mean Private Hours Recorded in Fee Dispute	5.7
Mean Government Hours Recorded in Fee Dispute	6.4
Mean EAJA Award	\$4,236.19
Mean Fee on Fee Award	\$419.34
Chance of Private Side Winning	93%

slightly above the figure for all HHS cases. Of that \$59,332, \$4595 was expended on fees on fees, and HHS regional attorneys recorded ninety hours of attorney time, which would amount to \$6750 if calculated at \$75 per hour. Those amounts taken together constitute approximately twenty percent of the amount of fees claimed, a lesser percentage than in non-social security cases. In all of the cases, however, the regional HHS attorney worked in tandem with an Assistant U.S. Attorney (AUSA). The hours for the AUSAs were not recorded, but even if the AUSAs devoted less time to EAJA applications than did the regional attorneys, the number of hours expended by government attorneys should be substantially higher than the numbers I obtained. In addition, it is impossible to reconstruct how much time was devoted to the substantial justification issue, but in the only case in which the government prevailed, the HHS attorney expended an estimated fifteen hours in defeating a \$7650 claim, which was an abnormally large EAJA claim. Thus, in this

110. According to the Administrative Office, the 85% figure has stayed relatively constant for the last several years. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS '88-'90.

111. The HHS cases were from two regions, but there is no reason to suspect that HHS cases in those two regions differ significantly from cases in the rest of the country.

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sample of individual benefits cases, the utility of litigating the substantial justification issue is open to serious doubt and, in fact, the government evidently conceded the issue in some cases by agreeing to settlement. Extrapolating to the entire pool of HHS cases, the government saves very little from litigating the substantial justification issue, and the administrative burden is considerable. The greater rate of settlement in HHS cases is thus quite understandable. Fees on fees, as well as the need to compensate government attorneys, nearly cancel out the amount of money saved due to the periodic finding that the government's position was substantially justified.

In addition, although the data were sketchy, government attorneys successfully reduced the \$67,327 originally requested in the EAJA applications to the \$59,335 awarded. Overall, then, in the fourteen cases, government attorneys saved slightly more by litigating than they would have had they paid the full fee requests, not considering: (1) any deterrent effect on subsequent applications; (2) hours generated by AUSAs; and (3) hours expended in judicial resources. From the perspective of the taxpayer, the wisdom of such government litigation is questionable at best, unless the deterrent effect on future fee applications is significant.

c. *EAJA applications arising from agency adjudications.* The Administrative Conference issued two reports to cover the time period targeted in the study. In its first report, it reported that 108 fee applications from agency adjudications were resolved, with fifty-six grants and fifty-two denials. The amount awarded was \$577,077,¹¹² the mean award being \$10,305. In thirty-three of the fifty-two applications denied, the agency determined that the government had been substantially justified in the underlying litigation.

In the next year, only seventy applications were decided: thirty-four applications were granted and thirty-six denied. The total amount awarded, however, \$961,672,¹¹³ was almost double the preceding year. The difference largely stems from the presence of one \$475,724 award. Because of that award, the mean award jumped to \$28,284, while the median remained constant, at \$10,868. Nineteen applications were denied because the agency determined that the government had been substantially justified in the underlying litigation.¹¹⁴

112. This figure does not include awards for 19 cases in which the amount was not reported or in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT: OCTOBER 1, 1988—SEPTEMBER 30, 1989 3 (1990).

113. This figure does not include awards for eight cases in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT: OCTOBER 1, 1989—SEPTEMBER 30, 1990 3 (1991).

114. *Id.*

Within this group of cases, I received relatively complete data on eight cases, which constitutes roughly ten percent of the cases in the target year (Tables 4-5). The government defeated the application in two cases, in one

Table 4: Agency Cases

Number of Cases	8
Mean Private Hours Recorded in Fee Dispute	93.1
Mean Government Hours Recorded in Fee Dispute	58
Mean EAJA Award	\$81,459.87
Mean Fee on Fee Award	\$6,419.93
Chance of Private Side Winning	75%

because its position was substantially justified, and in the other on jurisdictional grounds. The total amount awarded from the eight applications was \$651,678, which includes the single largest award in that year, the \$475,724 award in resolving consolidated claims before the Armed Services Board of Contract Appeals. The amount saved in the one case in which a hearing officer held the government to be substantially justified was \$9133. In pursuing the six successful applications, private attorneys estimated that they incurred \$51,358 in fees which were compensable as fees on fees (and factored into the overall award). For their part, government attorneys estimated that they expended 318.25 hours in fighting these applications, which at seventy-five dollars per hour (for the sake of comparison) amounts to \$23,869 of taxpayer money. Litigation fees thus constitute only six percent of the total amount claimed, and twice that percentage for the amount awarded.

It is impossible to determine how much of the private and government attorney resources was devoted to the substantial justification issue in this group of cases. Plainly, however, litigating over the substantial justification issue was not justifiable on a cost-benefit basis, and briefing the substantial justification issue generally takes up considerable time because of the research involved. At most, only \$9000 was saved in comparison to the ultimate awards totalling \$651,000. This figure is misleading, however, given that the government prevailed on the substantial justification issue in twenty-nine percent of the cases during the two-year period, which is almost fifty percent more than its success rate in non-social security court cases during the target year.¹¹⁵

115. At least one commentator has speculated that the greater incidence of denials due to substantial justification in agency cases reflects the agency adjudicator's lack of independence. David O. Stewart, *The Equal Access to Justice Act: A Failure in Agency Proceedings?*, NAT'L L.J., May 21, 1984, at 20.

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Government attorney efforts in this group of cases were successful in reducing the amounts originally claimed. According to the data submitted by the litigants, the amount originally sought in this group of eight cases was \$1,308,713. The government thus saved the taxpayers half of the amount claimed at an approximate cost of only \$51,000 in fees on fees, and perhaps half that amount again in government attorney time. Putting aside the question of adjudicatory resources, litigating over the size of the claim, at least in this group of cases, was clearly cost-effective. In addition to the government's success in reducing the large contract award from \$968,490 to \$475,724, private claimants ultimately received only \$176,954 for the other cases (Table 5), despite the \$340,223 initially claimed.

Table 5: Agency Cases*

Number of Cases	7
Mean Private Hours Recorded in Fee Dispute	34.8
Mean Government Hours Recorded in Fee Dispute	32.0
Mean EAJA Award	\$25,136.35
Mean Fee on Fee Award	\$1,967.60
Chance of Private Side Winning	71 %

**Table 5 reflects the same data as does Table 4, excluding the one large claim of almost \$1 million.*

In short, the data collected confirm that the government successfully invokes the substantial justification defense in a modest proportion of all cases: in less than fifteen percent of the social security cases, in twenty percent of non-social security court cases, and in thirty percent of agency cases. The data, however, were too sketchy to demonstrate anything else empirically. The failure of government attorneys to record the time they spend on various cases itself suggests the difficulty of forcing the government at present to internalize the cost of litigation. Nonetheless, evidence collected in the sample of cases corroborates the thesis that, had the substantial justification standard been rescinded, the overall government expense in administering the EAJA would not have been significantly greater, putting aside the question of how many new applications might be filed. The money saved through litigation was modestly in excess of the amount of fees on fees paid and compensation due government counsel, disregarding judicial costs.

B. *Impact on Settlement*

Theoretically, the EAJA not only generates substantial litigation costs, it is also likely to make the underlying dispute with the government more difficult to resolve. Disagreements over whether liability for fees exists and the amount of attorney's fees that may be recoverable augment the odds that the parties will be unable to come to an amicable agreement in the underlying suit.

In the absence of the EAJA, private parties litigating against the government will likely settle if their expected recovery is less than the government's expected loss or if their expected loss is greater than the government's expected gain. Viewed another way, the parties will likely settle if the plaintiff's estimate of the expected judgment exceeds the defendant's estimate by less than the sum of their anticipated legal costs.¹¹⁶ Obviously, there are pragmatic reasons why settlement may not occur even under these circumstances—whether because of precedential value, strategic bargaining, lack of information, etc.—but many cases will settle, particularly if they involve financial issues with little systemic impact. Assuming risk neutrality (and insignificant settlement costs), the governmental and private parties will determine whether to settle by discounting the possible outcomes of their litigation by their probability of success.¹¹⁷ For instance, if a plaintiff has a \$10,000 claim against the government, an eighty percent chance of prevailing, and anticipates expending \$4000 in legal fees, its expected gain is \$4000. Assume that the government litigator believes that it has a thirty percent chance of losing, and estimates its costs in terms of resources expended at trial to be \$2000. The government, therefore, will likely lose \$5000 from the litigation, and the difference between plaintiff's expected gain of \$4000 and the government's expected loss of \$5000 creates a "positive" bargaining range of \$1000 in which both parties have an incentive to settle.¹¹⁸ The incentives to settle when the government is plaintiff should be identical.

If the Equal Access to Justice Act applies, however, the potential for settlement diminishes. In the same hypothetical, the private plaintiff now believes it has not only an expected judgment of \$4000, but perhaps a sixty percent chance (given the substantial justification standard) of recovering its \$4000 in expenses, for a total expectation of \$6400. The government in turn might consider that it has a twenty percent chance of paying fees, and thus its

116. See Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63 (1982).

117. *Id.* at 57.

118. This relationship can be expressed algebraically to suggest that the private plaintiff will settle if $px - a \leq qy + b$, where p = plaintiff's expectation of prevailing; q = defendant's expectation that plaintiff will prevail; a = plaintiff's expected legal fees; b = defendant's expected legal fees; x = plaintiff's estimate of judgment; and y = defendant's estimate of adverse judgment. For similar analyses, see Shavell, *supra* note 116, at 63.

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expected loss now approaches \$5800.¹¹⁹ The bargaining gap is now negative, and the parties will not likely settle the litigation.¹²⁰

To be sure, if the parties have the same estimate of the government's likelihood of paying attorney's fees, then the bargaining span should not change, even if the total amount of money at stake has increased. Yet in many, if not most cases, the government's estimate of its liability for fees will be less than that of the plaintiff—the government generally has a higher expectation of success on the merits of both the underlying action and the fee issue itself.¹²¹ When the government's estimate of fee exposure is less than that of plaintiff (largely because of the substantial justification standard), there is consequently, a diminished range within which to reach a settlement under a fee-shifting scheme.¹²² This result makes a good deal of intuitive sense because when parties have more to disagree over, the prospect of agreement dims.¹²³ Of course, other factors are involved in the decision of whether to settle but, generally, the prospect of fee shifting under the EAJA should make settlement more difficult to obtain.

If anything, the EAJA may in fact create a perverse incentive to litigate. Anecdotal evidence suggests that some government attorneys view an award of attorney's fees as stigmatizing because of the prerequisite determination under section 2412(d) that the government's actions were not substantially justified. Few attorneys believe that the policy or enforcement choice they are defending is unreasonable, and thus few are willing to concede that a prevailing party is entitled to fees under the current standard. Settlement is thus less likely because of the understandable reluctance to label the government's conduct, and by extension one's own, as unreasonable.¹²⁴

Moreover, an award of fees under the EAJA—if issued contemporaneously with the judgment on the merits—may furnish an incentive for government litigators to appeal the underlying judgment. The Solicitor General frequently declines to authorize appeal of adverse district court decisions even when

119. This figure might be somewhat higher because of the possibility that the government may additionally be required to pay fees for the fee litigation.

120. Similarly, if government litigators do not internalize the cost of government litigation in deciding whether to settle, then settlement under these facts is even less likely.

121. Should the government overestimate the amount of private attorney's fees required for litigation, the prospect for settlement is accordingly enhanced.

122. In cases in which the plaintiff's estimate of the probability of success exceeds that of the defendant, the joint expected legal costs are lower, reducing the possibility of settlement. Shavell, *supra* note 116, at 67; *Predicting the Effects*, *supra* note 25, at 157; cf. Schwab & Eisenberg, *supra* note 29, at 755 (hypothesizing that the government is generally less risk averse than its opponents).

123. One could argue that elimination of the substantial justification standard in some contexts might hinder settlement. Government attorneys, for instance, might be reluctant to settle cases or might decline to appeal adverse judgments if they recognize that a fee award would automatically follow. But more likely, the prospect of fees might prompt government attorneys in other cases to settle or decline appeal because of the very fear of expanding the government's fee liability.

124. Government attorneys may also wish to avoid paying fees under the EAJA given that EAJA rates—even with the cap—are significantly in excess of what most government attorneys earn.

agencies lobby for appeal. Because non-mutual collateral estoppel cannot be applied against the government,¹²⁵ the Solicitor General may await better facts or a more favorable jurisdiction to press the same legal principle. But an award of fees under the EAJA intensifies the force of an adverse precedent. If the government raises the issue anew in future litigation, the opposing party can assert that at least one judge not only rejected the government's position previously, but found it unreasonable. Thus, an award of EAJA fees may well encourage more litigation by government officials striving to minimize the impact of adverse precedents.

Many instances of government litigation, unlike litigation over eligibility for benefits or over contract performance, do not involve money per se.¹²⁶ Settlement of non-financial issues is typically far more difficult to obtain. And even those suits involving money may readily implicate principles extending far beyond the case at hand. In light of the difficulty in settling suits involving the government, the added complication of the EAJA may only be a comparative nuisance. Nonetheless, passage of the EAJA, particularly in light of the parties' likely disagreement over applicability of the substantial justification standard, has made settlement of the underlying suits between private litigants and the government, as a theoretical matter, slightly more difficult to achieve.

III. POTENTIAL REVISIONS

The data generated by the empirical study, in conjunction with analysis of the incentive structure in the EAJA, suggest that at least some revision of the Act is needed. First, automatic fee shifting is warranted in the social security disability context, which comprises the vast majority of all EAJA fee litigation. An automatic one-way fee-shifting mechanism should encourage more meritorious claims to be brought with only moderate expense. Transaction costs would be minimized and settlement plausibly facilitated under such a scheme, and government officials in charge of making eligibility determinations for benefits might be forced to think a little longer before acting. Perhaps more importantly, benefits claimants would be able to enjoy the full use of back benefits payments without needing to pay a substantial percentage in attorney's fees.

Second, settlement should be facilitated to minimize the inordinate costs of satellite fee litigation—litigation following resolution of the underlying dispute. Congress should enact an offer-of-judgment mechanism to encourage government counsel to make an offer of judgment on the EAJA claim immedi-

125. See *United States v. Mendoza*, 464 U.S. 154, 162-64 (1984).

126. Tort claims involve money, but the Equal Access to Justice Act excludes fee shifting in tort cases. The Federal Tort Claims Act permits private counsel to recover fees out of the award itself. See 28 U.S.C. § 2678 (1988).

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ately upon losing the underlying case. If the private party rejects the government's offer and then does not receive more than that offer after judgment, it should not be able to recover any fees or expenses incurred after the offer. Moreover, by clarifying as many ambiguities in the Act as possible, Congress could further the prospect of settlement and, at the same time, make the litigation that arises less expensive.

A. *The Special Case of Litigation Over Individual Benefits Claims*

Despite shaky arguments for expanding one-way fee shifting against the government in general, the case for promoting fee shifting in the context of individual benefits determinations,¹²⁷ which comprise the vast majority of all EAJA litigation, is quite strong. Automatic one-way fee shifting would ensure representation in cases involving even small individual benefits claims that would not otherwise attract counsel. And from a distributive justice perspective, there is much to be said for permitting those whose benefits were incorrectly denied to recover the full amount of back benefits without having to pay attorney's fees. Though the prospect of improving the complex social security system through fee shifting is perhaps chimerical,¹²⁸ there is concomitantly little reason to fear overdeterrence.

Transforming the EAJA to automatic fee shifting in the individual benefits context is normatively appealing. First, the change to automatic fee shifting would provide an incentive for private attorneys to accept small individual benefits claims under both Title II and Title XVI of the Social Security Act.¹²⁹ Through contingency fee arrangements, most beneficiaries with strong

127. Most individual benefits claims arise under the Social Security Act, but there are others as well. My proposed revision would cover all individual benefits claims brought directly under 42 U.S.C. § 405(g) (1988), the provision authorizing judicial review for disputed social security claims, or under a provision cross-referencing 42 U.S.C. § 405(g), such as under the Medicare Act, 42 U.S.C. § 1395ff(b) (1988).

128. Some may argue that the system is simply too vast. In fiscal year 1989, for example, there were over 300,000 requests for hearings before ALJs, 61,000 requests for review before the Appeals Council, and almost 8000 cases filed in district court. Given the approximately \$200 billion in total payments that year, the added cost in EAJA fees is *de minimis* and therefore cannot be expected to induce change. SSA, ANN. REP. TO CONG. (1990). Moreover, because substantial efforts have already been devoted towards improving the accuracy and efficiency of the system, it may be somewhat optimistic to think that awarding EAJA fees in more cases each year will prompt the HHS to consider new ways to improve the system. See generally JERRY MASHAW ET AL., *SOCIAL SECURITY HEARINGS & APPEALS* (1978); see also Richard Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

Nonetheless, the Appeals Council in recent years has begun to review more denials on its own motion before a civil case can be filed. See SSA, ANN. REP. TO CONG. 13 (1991) (Appeals Council has accepted more appeals to ensure "enhanced legal defensibility of hearing decisions"). That action might in part be explained by the awareness of HHS that weeding out bad cases may save the agency EAJA fees down the road.

129. 42 U.S.C. § 401-433 (1988) (Title II); 42 U.S.C. § 1381-1385 (1988) (Title XVI). Title II, which is the larger program financially, is funded by payments into the Social Security Trust Fund and is not based on need. Payments protect against the loss of earnings due to retirement, death, or disability. SSA, ANN. REP. TO CONG. 5-7 (1991). The Supplemental Security Income program in Title XVI, by contrast,

claims of significant size can obtain an attorney, if they desire, to press their claims. For instance, Title II of the Social Security Act, which is an insurance program, directs the Social Security Administration to withhold from any judgment a reasonable fee, not to exceed twenty-five percent of back disability benefits awarded,¹³⁰ thus ensuring counsel a guaranteed payment mechanism. Moreover, the likelihood of prevailing in a disability case under Title II is close to fifty percent, with many specialized attorneys expecting to prevail in eighty percent of the challenges they bring.¹³¹ Although the contingency fee may be quite generous if the back benefits owed are substantial, a twenty-five percent award might be insufficient to attract counsel if the back benefits at stake are small. Converting to automatic fee shifting under the EAJA therefore will encourage counsel to represent beneficiaries with small disability claims who cannot attract counsel through contingency fee arrangements.¹³²

Perhaps more importantly, automatic fee shifting may encourage counsel to pursue supplemental assistance claims under Title XVI of the Social Security Act, which is based on need. Although the definition of "disability" is the same under both Title II and Title XVI, claims under Title XVI differ from those under Title II in two fundamental respects. First, they are typically smaller,¹³³ and second, the payment mechanism under 42 U.S.C. § 406(b) is not available,¹³⁴ which omits an attractive feature of disability litigation from counsel's perspective. No one disputes that many beneficiaries with plausible claims under Title XVI cannot currently obtain counsel.

Thus, eliminating the substantial justification standard would directly

is funded out of general tax funds. Cash benefits are paid to individuals with limited resources who are 65 or older, blind, or have disabilities. *Id.*

130. 42 U.S.C. § 406(b) (1988). Courts currently construe the statutory language to permit a 25% award in almost every context, irrespective of the seemingly independent qualification that the award must be "reasonable." The Sixth Circuit, for instance, has held that awards up to twice the market rate should automatically be considered reasonable, but that any award in excess of that amount should be subject to special scrutiny. *Hayes v. Secretary of HHS*, 923 F.2d 418, 422 (6th Cir. 1990); *see also Wells v. Sullivan*, 907 F.2d 367, 370-72 (2d Cir. 1990) (approving award of 25% of judgment and discouraging HHS efforts to contest such awards).

131. The 50% success rate, *see infra* note 139, includes pro se claimants, which explains why counsel can anticipate prevailing in more than 50% of the cases.

132. Prevailing parties currently may seek attorney's fees under the EAJA if the government cannot demonstrate that its position in the underlying litigation was substantially justified. The prospect of fees under the EAJA provides an incentive in small cases if counsel can accurately predict the likelihood that the government lacked substantial justification in denying benefits. Eliminating the substantial justification standard would make the prospect of recovery more certain and thus, at least at the margin, encourage more suits. Unlike the award under the Social Security Act, fee awards under the EAJA must be paid by the agency out of appropriated funds, which arguably promotes deterrence. The attorney must return the lesser of the two awards to the client. Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183, 186.

133. The maximum monthly benefit currently is \$422 per month. Social Security Bulletin Annual Statistical Supplement 4 (1991). In contrast, disability benefits are not strictly based on need, and thus can greatly exceed the SSI maximum. Almost one-half of all court cases involving benefits claims administered by the Social Security Administration involve SSI claims, at least in part. SSA, ANN. REP. TO CONG. 34 (1991).

134. *See Bowen v. Galbreath*, 485 U.S. 74, 79 (1988).

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advantage those beneficiaries pursuing small claims, which presumably is the category for which the EAJA is most needed. Although encouraging all small claims to be brought against the government might be inefficient—the judicial system cannot easily handle small claims effectively¹³⁵—encouraging those who can least afford to be without benefits to file individual benefits claims¹³⁶ arguably is justified.

Second, the change to automatic fee shifting would provide greater incentive for counsel of prevailing benefits claimants to apply for an EAJA award, even after receiving a contingency fee in excess of the lodestar (calculated by multiplying the number of hours reasonably expended by, at most, seventy-five dollars per hour adjusted for a cost-of-living increase), for which they would be eligible under the EAJA. Currently, even if attorneys believe that the government's position has been unjustified, they may decline to seek fees under the EAJA. Litigating the EAJA claims may not result in any benefit to counsel, and counsel have little incentive to pursue such EAJA claims, particularly given the risk that they would be found ineligible for fees, and thus forfeit all work devoted to the EAJA claim. Moreover, even if the twenty-five percent award is comparable to what could be recovered under the EAJA, the private attorneys face the risk of losing the EAJA case, and the loss probably cannot be chargeable to their impecunious clients.¹³⁷ An EAJA application might also delay payment of attorney's fees under the Social Security Act because judges frequently decide the issues together.¹³⁸ From a cost-benefit perspec-

135. The incentive to litigate small claims aggressively may prove beneficial to the system as a whole. Fee shifting enables a plaintiff to extract more from a recalcitrant defendant, and such defendants will more likely settle future small claims expeditiously. See Thomas D. Rowe, *The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics, and Ex Ante Analysis*, 1 GEO. J. LEGAL ETHICS 621, 624-25 (1988).

136. Applications for fees arising out of class actions should be resolved like applications arising out of other cases not involving individual benefits claims. Class actions typically challenge policy formulated or implemented by the agency as opposed to the substantial evidence underlying a particular benefits determination. If the substantial justification standard is to be retained in other policy contexts, then it should apply in SSA classwide litigation as well. SSA has estimated that 100 class actions currently are pending. SSA, ANN. REP. TO CONG. 13 (1991).

137. While the prospect of fees on fees creates some countervailing incentive to seek fees under the EAJA, the prospect of a loss—particularly when the original award was generous—deters private attorneys from seeking EAJA fees. This same conflict of interest can arise under the EAJA whenever private counsel can recover more from the client than they can from the government. It is particularly acute in contingency fee cases because counsel are not paid by the hour and thus may receive no compensation for litigating the fee question.

138. Combining the attorney-fee mechanisms in the EAJA and the Social Security Act presents an attractive option, but one which is fraught with difficulty unless substantial revisions are made. As an initial matter, many would oppose the interference with private contract if the EAJA completely supplanted the private contract between client and attorney. Moreover, if the EAJA compensated all prevailing parties at a level replicating a market contingency fee, the problem of providing incentive for counsel to accept small cases would remain. At the same time, the prospect of overcompensating attorneys would exist in several contexts. First, the SSA would pay more than it currently does in those cases in which substantial back benefits are awarded, and second, payment on a percentage basis might overcompensate those attorneys—particularly legal services attorneys and those compensated by insurance plans—who do not face risk of nonpayment from accepting a social security case. A further difficulty would arise given that fees

tive, therefore, it may not be worth the private attorneys' time to pursue the EAJA remedy, even when the government has not been substantially justified. As a result, the social security claimants suffer and, conversely, the coffers of SSA benefit.

In fiscal year 1989, for example, there were approximately 6000 claimants who prevailed as a result of court cases (predominantly disability and SSD), and most presumably would be eligible for EAJA fees.¹³⁹ Yet there were only 2000 applications for fees in the target year.¹⁴⁰ Thus, only one-third of eligible prevailing parties apparently pursued fees through the EAJA. Part of the reason for the limited use of the EAJA may stem from self-selection—parties recognize that the government was likely substantially justified. But much of the explanation—and my guess is most of it—centers on the lack of incentive for counsel representing disability claimants to file for EAJA fees.

In light of the perverse incentives, judges in a number of jurisdictions have required attorneys to file EAJA claims in each case in which the social security claimant prevails to ensure that such attorneys do not take the easy way out to the detriment of their clients.¹⁴¹ Claimants in these jurisdictions have been just as successful as others in obtaining EAJA awards, suggesting that the low filing rates manifested elsewhere stem from a conflict of interest and not self-selection. In the District of New Jersey, for instance, Social Security Administration records reveal that thirty-seven of forty-two claimants were awarded EAJA fees in the target year, which replicates the same percentage in all the social security disability cases. In the Middle District of Florida, which similarly requires all prevailing claimants to file for EAJA fees or provide an explanation for not doing so,¹⁴² private parties succeeded in twenty-two of twenty-four EAJA cases in the target year. The success ratio in these jurisdictions highlights the probable underutilization of EAJA by counsel litigating individual benefits claims in other jurisdictions.¹⁴³

for work in administrative proceedings are currently available under the Social Security Act but not under the EAJA.

139. The Social Security Administration reported in fiscal year 1989 that there were 6616 final court decisions, of which it prevailed in 72% of the cases. However, the claimants prevailed in 80% of a similar number of remands. SSA, ANN. REP. TO CONG. 21, 29 (1990). Thus, there were likely over 6000 claimants who ultimately prevailed. There were fewer final court decisions and remands in fiscal year 1990, which the agency attributed to the Appeals Council's more aggressive position in accepting more appeals to forestall successful court actions. See SSA, ANN. REP. TO CONG. 13 (1991).

140. The applications for fees considered in the study did not necessarily arise from all cases decided during fiscal year 1989 because of delays from remands, delays in deciding the fee applications, etc.

141. *Salaberio v. Secretary*, No. 84-1618 (Dist. N.J. Apr. 13, 1988); see also *Sumler v. Bowen*, 656 F. Supp. 1322, 1338-39 (W.D. Ark.), *aff'd*, 834 F.2d 711 (8th Cir. 1987); *Dowdy v. Bowen*, 636 F. Supp. 591, 594 (W.D. Mo. 1986); *Taylor v. Heckler*, 608 F. Supp. 1255, 1257 (D.N.J. 1985).

142. *Knagge v. Sullivan*, 735 F. Supp. 411, 415 (M.D. Fla. 1990).

143. I doubt that the self-selection explanation has much force. Private parties recognize that the Secretary previously has been held to be unsupported by substantial evidence and that they enjoy greater than an 85% statistical likelihood that a court will find the government's position not to be substantially justified. I could not discern significant differences between cases in which EAJA fees are brought and those in which the private attorney relied on a different payment mechanism.

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Thus, converting to an automatic fee-shifting system would minimize the ethical quandary faced by counsel in social security cases.¹⁴⁴ Even when the amount recovered under a contingency contract would exceed the EAJA award, that award would offset some of the attorney's fees that the claimant must otherwise pay to her attorney.¹⁴⁵

Third, the shift would spare the government significant administrative expense because the question of substantial justification—which is the only disputed question in much EAJA social security litigation—would not arise. Because both sides will probably develop sufficient familiarity with social security cases to gauge the reasonableness of hours expended in a given case, the issues of the appropriate number of hours and the appropriate rate should be readily determined. In fact, anecdotal evidence suggests that in some jurisdictions there is no current dispute over the reasonable number of hours expended in disability cases.¹⁴⁶ Although the savings in expenses would not fully compensate for the total increase in EAJA awards paid by the Social Security Administration, the SSA would likely pay more currently but for the private attorneys' self-interested decision to forego the EAJA route.

Moreover, the policy would produce substantial savings in judicial resources. More than 2000 cases were resolved (through litigation and settlement) involving EAJA applications in the target year; while most cases were probably resolved quickly, the aggregate takes a toll on the already overloaded

144. Even with automatic fee shifting, some counsel might not bother to file for fees since they stand to gain nothing from the hours expended. Because counsel must return the lesser of two fee awards to the client, there is scant incentive for litigating under the EAJA if the EAJA award is not likely to be greater than the award under the Social Security Act. When the EAJA award is less than the private fee arrangement, the problem is exacerbated if courts require prevailing parties' counsel to return fees on fees for the EAJA litigation as well as fees for the underlying litigation. Counsel should at a minimum be able to keep that part of the fee award attributable to the fee litigation since such compensation does not represent "fees for the same work." Pub. L. No. 99-80, 99 Stat. 183, 186 (1985).

A requirement that all prevailing social security claimants file for EAJA fees, as in the District of New Jersey, is problematic, however, given that private counsel would be forced to initiate litigation for which they might not receive compensation. *Cf. Venegas v. Mitchell*, 495 U.S. 82, 1679 (1990) (articulating norm against interference with contract between plaintiff and counsel in § 1988 suit).

145. The fact that only approximately one-third of prevailing parties in individual benefits cases file for EAJA fees is particularly startling given the substantial percentage of SSI cases included. Counsel for SSI claimants should have greater incentive to file for EAJA fees given the smaller size of the claim and the fact that no payment mechanism exists. Thus, the percentage of successful Title II disability claimants who file for EAJA fees may well fall under 33%.

Underutilization also might arise from a lack of information. Some corroboration for this explanation lies in the fact that, according to SSA, the percentage of prevailing claimants who file EAJA petitions has gradually increased in the past several years. The heightened awareness may be attributable in part to Supreme Court cases such as *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), and *Sullivan v. Hudson*, 490 U.S. 877 (1989), which received considerable publicity in the social security community.

146. In other jurisdictions, however, there is little cooperation between attorneys representing social security claimants and Assistant United States Attorneys, and agreement cannot always be reached on the pertinent amounts. To the extent that such inability to compromise is attributable to private attorneys who overreach, an offer of judgment device should aid the government. *See infra* text accompanying notes 154-67. To the extent that the disagreement is attributable to the government's intransigence, the automatic fee shift means that the private attorney will ultimately be compensated for any protracted litigation over the proper amount of the award.

judicial system. Automatic fee shifting would minimize that burden.¹⁴⁷

Fourth, there is little fear of overdetering social security decisionmakers.¹⁴⁸ In evaluating disability, HHS officials recognize that disability determinations will be overturned only if there is not substantial evidence in the record. Here, the substantial evidence standard creates a safe harbor such that determinations at the margins of the statutory standards should be upheld.¹⁴⁹ Officials who determine eligibility for benefits should not be chilled by the prospect of fees from making close calls because they are protected by a deferential standard of review.¹⁵⁰ Indeed, because the substantial justification standard cannot be easily distinguished from the substantial evidence standard, today's EAJA is not far from an automatic fee-shifting statute in individual benefits litigation.¹⁵¹ Statistics demonstrate that correlation.¹⁵² In the target year, eighty-five percent of EAJA applications in social security cases were granted; some of the unsuccessful applications were denied for reasons other than substantial justification, such as lack of timely filing.¹⁵³

147. The 2000 fee cases represent three percent of all civil cases involving the government resolved each year. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 172 (1989). That percentage is somewhat misleading given the relatively few resources needed to adjudicate EAJA cases in comparison to antitrust cases, malpractice cases, etc.

148. Indeed, as mentioned earlier, there is scant reason to believe that the change will lead to any significant deterrence. See *supra* note 128.

149. This is not to ignore the likelihood that courts might now apply a standard far stricter than the substantial evidence standard; thus, they may reverse the Secretary in cases in which the claimant appears particularly sympathetic or the Secretary's analysis seems sloppy. Nonetheless, the possibility of judicial misapplication exists not only in this context but in determining the merits of the underlying lawsuit between the government and private party as well as in determining the substantial justification of the government's position. It is impossible to ascertain to what extent courts are fulfilling their statutory mandate. My recommendation for restructuring the EAJA is predicated on courts' good faith, even if erroneous, application of the governing legal principles.

150. One study found that HHS ALJs were not even concerned with the prospect of judicial review, let alone the prospect of an EAJA award. MASHAW ET AL., *supra* note 128, at 139-40 (ALJs not deterred by prospect of judicial review, given the modest (seven percent) percentage of cases that are appealed) to court.

151. Courts have uniformly held in the wake of *Pierce v. Underwood*, 487 U.S. 552 (1988), that a finding of substantial evidence cannot be equated with a lack of substantial justification. The failure of the Secretary to explain her decision adequately, or her reliance upon conflicting testimony, may be reasonable, even if not supported by substantial evidence. See, e.g., *Cohen v. Bowen*, 837 F.2d 582 (2d Cir. 1988); *Hadden v. Bowen*, 851 F.2d 1266 (10th Cir. 1988); *Taylor v. Heckler*, 835 F.2d 1037 (3d Cir. 1987); *Pullen v. Bowen*, 820 F.2d 105 (4th Cir. 1987). Nonetheless, a safe harbor exists by virtue of the deferential standard of review, minimizing the fear of overdeterrence.

152. See *supra* text accompanying notes 109-10.

153. Finally, eliminating the substantial justification standard arguably comports with corrective justice principles, even to the extent that such principles require compensation only when the defendant has been at fault. See *supra* note 77. Courts only overturn the Secretary's denial of benefits when the determination lacks substantial evidence. Even though the government's position may not lack substantial justification, the government's determination can be considered wrongful if it is not supported by substantial evidence. The substantial evidence standard establishes a fault standard, though at a lower threshold than the substantial justification test. Fees awarded for erroneous denials, therefore—at least in the vast majority of disability cases—provide compensation when the government has been at fault. Even those who believe that the government is not necessarily at fault when claimants prevail might conclude that the cost (and difficulty) of identifying those cases is too prohibitive given that the threat of overdeterrence is underwhelming. Moreover, even when the government is not at fault, corrective justice principles might suggest that

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Thus, because of the strong case for distributive justice, the abundance of social security claims involving small, strong claims, and the minimal fear of overdeterrence, prevailing parties in individual benefits litigation should be entitled to fees irrespective of the substantial justification of the government's position.

B. *Minimizing Litigation Costs*

1. *Offer-of-Judgment Provision*

To promote settlement in all EAJA cases, Congress should adopt an offer-of-judgment device which grants to the government leverage to force settlement. With an offer-of-judgment device, the defendant's formal offer of settlement exposes the other party to financial penalties for rejecting offers the value of which are not recovered at trial. Although the offer-of-judgment device would benefit the government, the fee cap could be raised to offset that advantage while retaining the benefit of speedier settlement.

Currently, Rule 68 of the Federal Rules of Civil Procedure provides that "[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . [and i]f judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68 applies primarily to costs incurred by both sides such as witness fees and transcripts, but it does not usually cover attorney's fees. In general government litigation, therefore, if a private litigant rejects a settlement offer by the government and then does not do better at trial, the government need not pay that party's post-offer costs, and the private party will be liable for any costs generated by the government after the offer. Rule 68 is likely to be effective only in complex litigation situations, such as large contract actions before the Claims Court, when the costs are quite large. But Rule 68 would be of little help in most government litigation because the costs are unlikely to be large enough to give the government leverage to force early settlement.

An offer-of-judgment device could, however, include attorney's fees as well as costs. The Civil Rights Attorney's Fees Awards Act¹⁵⁴ treats attorney's fees as part of costs.¹⁵⁵ Presently, governmental defendants in civil

the claimants' loss itself is wrongful because the government has deprived beneficiaries of a statutory entitlement and enjoyed the use of the money in the interim.

154. 42 U.S.C. § 1988 (Supp. III 1991).

155. The Federal Advisory Committee on Civil Rules proposed that Rule 68 be expanded generally to encompass attorney's fees. The proposal was rejected, in part because of the fear that strengthening Rule 68 would undermine Congress's overall intent to promote fee shifting. See William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

rights suits can exercise leverage over plaintiffs by making an early formal settlement offer. The offer forces plaintiffs to continue litigating at the peril of sacrificing their post-offer attorney's fees, as well as costs.¹⁵⁶ Likewise, Rule 68 could be amended to permit the federal government to make an offer of judgment which, if not accepted and not improved upon at trial, would cause the private party to forfeit its post-offer attorney's fees. An amended Rule 68 could be effective in protracted government litigation involving considerable money such as in complicated Medicare reimbursement disputes. But those cases represent only a sliver of government litigation. The majority of cases involve nonmonetary issues as well as denials of benefits in which the amount at stake is not in dispute—cases in which the offer-of-judgment device is likely to be ineffective.¹⁵⁷ Moreover, an offer-of-judgment device is not generally relevant in affirmative litigation filed by the government. Thus, even if Rule 68 or a similar procedure permitted shifting attorney's fees as well as costs, it would not be effective in hastening resolution of the underlying contest between the government and private party.¹⁵⁸

Nonetheless, Rule 68—or a comparable provision—might have substantial impact if applied to the collateral attorney-fee dispute itself.¹⁵⁹ The fee dispute concerns only money, and thus an offer-of-judgment device can effectively streamline the litigation. After losing a case, government attorneys could immediately assess the government's fee exposure and make a settlement offer that would compel the private party to accept the offer.¹⁶⁰

(advocating expanded utilization of Rule 68 to include fees).

156. Courts have, however, rejected the possibility that a civil rights plaintiff must pay the defendant's post-offer fees, as they must pay costs. *See, e.g.,* Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986). Judges have reasoned that such fee shifting would frustrate Congress's decision to encourage suits. *See also* Marek v. Chesny, 473 U.S. 1 (1985) (upholding applicability of Rule 68 in § 1988 context); Kirchhoff v. Flynn, 786 F.2d 320 (7th Cir. 1986) (commenting on defendant's incentive to use offer of judgment device in civil rights context).

157. An offer of judgment device may apply in nonmonetary contexts as well, but not very effectively. *See* Roy D. Simon, *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475, 485-91 (1986); Thomas L. Cabbage, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465 (1991).

158. In addition, confining the offer of judgment to the fee portion eliminates the complications faced by plaintiffs in calculating the monetary worth of nonmonetary relief and in projecting how much fee exposure they will have after trial. *See, e.g.,* Spencer v. General Elec. Co., 894 F.2d 651, 661-64 (4th Cir. 1990).

159. There are no reported cases addressing whether Rule 68 applies today to purely collateral proceedings such as an attorney's fee dispute. There is nothing in the language or structure of the provision, however, that would militate against its application. Whether or not Rule 68 currently applies to attorney-fee disputes, the EAJA could be amended to provide explicitly for an offer-of-judgment rule. *But cf.* Schwarzer, *supra* note 155 (advocating strengthened Rule 68 which would exempt statutory fee-shifting cases).

160. The most obvious impact of applying an offer-of-judgment rule to fee proceedings would be to benefit the government. *See, e.g.,* Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 121 (1986) (noting that the inclusion of fees in costs under Rule 68 operates to redistribute wealth from plaintiffs to defendants). As a package with the change to automatic fee shifting in social security cases, however, or with an elevation of the fee cap, private parties would benefit overall.

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Although academics disagree,¹⁶¹ the operation of offer-of-judgment rules will likely foster settlement in many cases. Implementation of the rule minimizes the economic incentive that prevailing parties have to prolong the litigation and generate additional fees. The economic literature also suggests that, irrespective of whether settlement is ultimately facilitated, the settlements which are concluded should come at an earlier point in the litigation, minimizing the total litigation costs.¹⁶²

Assume, for instance, that a prevailing party claims attorney's fees of \$16,000 for the litigation, and estimates that its fees in litigating the issue will amount to \$2000. The moving party believes that it has a sixty percent chance of collecting the full amount and a 100% chance of collecting the \$12,000 which the government is not contesting. In turn, assume the government estimates that it has a sixty percent chance of minimizing fees, believing the claim to be inflated by twenty-five percent, and assume that it estimates that its litigation costs would be \$1500. In the absence of an offer-of-judgment device, the private party estimates that it will receive \$14,400 for its claim, plus nearly all of its \$2000 in fees after litigation.¹⁶³ Thus, it may not accept a settlement offer of \$14,000 unless it is risk averse. The government, for its part, anticipates that, should it go to trial, it will lose \$1500 in its fees, \$13,600 for fees for the underlying litigation, and also \$2000 for the private attorney's fees, for a total of \$17,100. If the government officials were solely concerned with saving money in the case at hand, they would pay off the entire amount requested immediately, irrespective of the possibly padded claims. There obviously would be great pressure against such a course of action, out of fear of encouraging false or dubious claims against the treasury. Refusal to settle, however, as in the Department of Agriculture case discussed earlier, would likely be financially foolhardy.

The offer-of-judgment device would change the calculus considerably, shifting the range in the government's favor. Assume that the government makes an early settlement offer of \$14,000. If the private party litigates, it estimates only a sixty percent chance of exceeding that figure, and with it a forty percent chance of losing \$2000 in fees. Thus, assuming it must compensate counsel for extra work, its expected gain from trial would then diminish

161. Compare Miller, *supra* note 160, at 110-16 (positing that there will be only a slight effect on settlement) with *Predicting the Effects*, *supra* note 25, at 169 (suggesting a significant impact on the amount at which parties will settle).

162. Early empirical research suggests that the offer-of-judgment rule may bring parties to earlier settlement. See, e.g., Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 13, 30; *Predicting the Effects*, *supra* note 25, at 169.

163. Although the private party could recoup the \$2000 after trial, that amount may not represent a gain because it presumably must pay counsel for the work. This calculation may be complicated by a fee arrangement the private party established previously with counsel.

to \$13,600, and it may well accept the offer of settlement.¹⁶⁴ Some private parties might still insist on litigating, but most parties would accept the settlement offer and avoid the risk of less recovery should the parties go to trial. The offer-of-judgment device may have the effect of forcing plaintiff to decide whether to settle apart from the question of defendant's possible loss from proceeding to litigation.¹⁶⁵

Despite the benefit to the government, the offer-of-judgment device might not facilitate settlement if the government lowers its settlement offers in light of the plaintiff's increased risk. Yet some increase in settlements is to be expected for two reasons. First, because the government does not internalize its litigation costs, it will rarely if ever offer to settle a case for more than a private party can claim entitlement. The offer-of-judgment device shifts the settlement range downwards, thus making settlement possible in more cases. Second, because private parties have relatively modest assets, they are likely to be risk averse, and thus to accept low government offers for fear of jeopardizing fees.¹⁶⁶ Moreover, the offer-of-judgment device should "smoke out" realistic settlement offers from the government at an earlier stage in the fee litigation, and thus minimize overall litigation costs.¹⁶⁷ Finally, enactment of an offer-of-judgment provision might have a salutary effect in alerting government litigators—who do not fully consider litigation costs—to the potential efficacy of a speedy settlement. Thus, whether or not the substantial justification standard is retained, an offer-of-judgment device would reduce overall litigation costs by promoting settlement.

2. *Minimizing Issues for Litigation*

In addition to enacting an offer-of-judgment device, Congress could amend other provisions in the EAJA to minimize satellite litigation. The need for bright-line standards to reduce litigation costs is clear. I will briefly address two possibilities, though others exist.¹⁶⁸

164. The government's expected loss after trial still exceeds the private party's expected gain (\$15,900), but it is doubtful that the private party could extract more than its expected gain from the government, given that the government's expected loss at the moment of settlement is significantly lower, as it has yet to incur litigation costs.

If the private party's stake in settling increased to include liability for the government's post-offer attorney's fees, there would be a further shift in the range. The plaintiff would then expect to gain \$13,000 from the litigation, while the government would expect to lose \$15,000.

165. The private party will likely settle when $oj \geq p - (1-q)a$, where oj = the offer of judgment; p = the private party's expected fee recovery; q = its chance of exceeding the offer of judgment; and a = its projected attorney's fees in contesting the dispute over the fee award.

166. Schwab & Eisenberg, *supra* note 29, at 755.

167. For a proposal to expand present Rule 68 in tort cases, see AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 283-88 (1991).

168. For examples of recent litigation over complications arising out of the 30-day statute of limitations in the EAJA, see *Melkonyan v. Sullivan*, 498 U.S. 1023 (1991), which held that the duty to file a fee application within a 30-day period is triggered by a court judgment, even if the parties do not yet know

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a. *Enhancements.* Under the Act, private attorneys may argue that they merit greater than the seventy-five-dollar-per-hour statutory limit if they can point to a “special factor, such as the limited availability of qualified attorneys for the proceeding involved.”¹⁶⁹ Like the substantial justification standard, the enhancement provision creates uncertainty, diminishing the likelihood of settlement and increasing overall litigation costs. Consequently, the provision allowing special enhancements should be excised.

Courts understandably have been reluctant to find that particular attorneys qualify under the enhancement provision for fear of allowing the exception to swallow the rule. Because there is arguably a shortage of qualified attorneys at the seventy-five-dollar-per-hour range in most major markets across the country, following the plain language of the enhancement provision might permit enhancements in almost every case. The Supreme Court in *Pierce v. Underwood*¹⁷⁰ limited enhancements to situations in which counsel had some distinctive knowledge or skill, the special skill was required in the underlying litigation, and counsel with such qualifications could not be obtained at the capped rate. Although the Court indicated that patent attorneys might qualify for the enhancement,¹⁷¹ government attorneys have successfully combatted enhancements for their private counterparts who have expertise in matters such as appellate advocacy and social security litigation.¹⁷² Nonetheless, the possibility of enhancements creates uncertainty and, even after *Underwood*, provides grist for prolonged disputes between private counsel and the government.¹⁷³

The “special factors” language merely invites continued litigation, forestalling settlement of the fee issues and undermining the benefits of a bright-line fee cap. Moreover, the need for enhancement is questionable, given that the EAJA only rarely serves to induce litigation, and then primarily in small, strong cases. In any event, no attorneys, with the exception perhaps of those litigating social security cases, can currently expect even close to market rates from the EAJA. To the extent that exceptions to the fee cap are warranted, they should be spelled out by Congress, whether for patent attorneys or for those specializing in foreign languages. Perhaps the fee cap should be raised, but the benefits from a bright-line rule in this context plainly outbalance the

whether they have prevailed, and *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993), which held that the 30-day period for filing an application for EAJA fees begins immediately upon expiration of the time for appeal of a “sentence-four remand order.”

169. 28 U.S.C. § 2412(d)(2)(A)(ii) (1988).

170. 487 U.S. 552 (1988).

171. *Id.* at 572.

172. See *Phillips v. General Servs. Admin.*, 924 F.2d 1577 (Fed. Cir. 1991) (denying enhancement for pro bono representation and for contingency fee arrangements); *Chynoweth v. Sullivan*, 920 F.2d 648 (10th Cir. 1990) (knowledge of social security disability law was not a special factor).

173. See, e.g., *U.S. v. 313.34 Acres of Land*, 889 F.2d 814 (9th Cir. 1989) (suggesting possibility of enhancement in condemnation cases); *National Wildlife Fed'n v. FERC*, 870 F.2d 542, 547 (9th Cir. 1989) (awarding enhanced fees in light of specialized training in environmental and regulatory issues).

possibility that some private parties will not be able to obtain qualified counsel.

b. *Cost-of-living increases.* The Act also provides that the seventy-five-dollar-per-hour fee cap can be raised if "the court determines that an increase in the cost of living . . . justifies a higher fee."¹⁷⁴ Because the cap understates—and should understate¹⁷⁵—the prevailing market rate for attorney's fees, courts currently award a cost-of-living increase in almost all cases arising out of federal court litigation, with current rates approaching \$110 per hour.¹⁷⁶ Nonetheless, litigation has arisen with increasing regularity over the proper index and subcategory to use in calculating the cost-of-living increase.¹⁷⁷ The issue could easily be clarified if Congress selected the precise method or precise index category courts should use in calculating the increase.

Moreover, courts have split as to when the cost-of-living increase is applicable.¹⁷⁸ Although several dates are possible, choosing the date either when the application is filed or when judgment is entered creates a bright-line rule that would simplify the calculation. At the same time, basing the rate on a date after the work is performed would compensate a private party to some extent for the delay in payment. Otherwise, a party would only be compensated in 1992, for example, for work performed in 1988 at 1988 rates.¹⁷⁹ In any event, the date should be specified to narrow the issues for litigation and enhance the prospects for settlement.

174. 28 U.S.C. § 2412(d)(2)(A) (1988).

175. The benefit of a bright-line cap would be lost if the cap were too high. The government would then have the incentive, in many cases, to argue that the prevailing market rate was in fact *lower* than the capped rate. See, e.g., *Begley v. Secretary of Health and Human Servs.*, 966 F.2d 196 (6th Cir. 1992) (government argued that market rate for work performed was below \$75 per hour); *Trinidad v. Secretary of Health and Human Servs.*, 935 F.2d 13 (1st Cir. 1991) (same). To avoid that litigation, the cap should be set at the low end of the spectrum of market rates for attorneys. In this way, the statutory amount resembles a flat rate rather than a cap.

176. See, e.g., *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992).

177. See, e.g., *DeWalt v. Sullivan*, 963 F.2d 27 (3d Cir. 1992); *Harris v. Sullivan*, 773 F. Supp. 612 (S.D.N.Y. 1991).

178. Compare *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992) (cost-of-living increase should be calculated as of date work performed) and *Chiu v. United States*, 948 F.2d 711, 718 (Fed. Cir. 1991) (same) with *Garcia v. Schweiker*, 829 F.2d 396, 402 (3d Cir. 1987) (calculation should be made as of date on which plaintiff became a prevailing party).

179. See *Garcia*, 829 F.2d at 402 ("attorneys should not have the purchasing power of their fees eroded by such inflation"); cf. *Missouri v. Jenkins*, 491 U.S. 274, 278-84 (1989) (authorizing courts in § 1988 litigation to use current rates to compensate for delay).

IV. CONCLUSION

The Equal Access to Justice Act is the product of an uneasy compromise. Congress sought to encourage meritorious litigation against the government that would not proceed without the prospect of fee shifting, and it hoped that the possibility of fee shifting would deter government wrongdoing. At the same time, it placed safeguards in the Act, most notably the substantial justification standard, to prevent overdetering vigorous government policymaking and vigilant enforcement initiatives.

The effort at compromise has yielded only limited benefits. The prospect of fee shifting has only marginally encouraged private parties to contest government overreaching, because most private parties have adequate resources and incentives to press their challenges, and because the Act in any event promises only a modest and very uncertain fee recovery. Moreover, the Act has only an attenuated impact on deterrence. Policymakers are unlikely to internalize the costs of litigation, let alone attorney's fees, and such actors have sufficient incentives currently to pursue only "reasonable" policy initiatives. The question is somewhat closer for those government officials implementing previously set rules for, despite the political controls established by each agency, they are not as constrained by internal deliberation and outside lobbying in making fact-specific judgments, and are more likely to consider the overall litigation costs in determining the appropriate application of government policy in each successive case.

Much of the Act's limitations can be attributed to the substantial justification standard which attempts to steer a course between appropriate deterrence and unwarranted chilling of government initiatives. While unquestionably safeguarding against overdeterrence, the standard diminishes the Act's ability to induce private parties to challenge governmental action because the prospect of fees, even if the underlying claim is ultimately successful, is so unclear. The standard also blunts whatever deterrence fee shifting would otherwise have because of government officials' reluctance to consider (despite the statistics) that judges *ex post* may view governmental action to be unreasonable. In addition, the standard not only deprives some injured parties of compensation, but it encourages a second round of litigation for all private parties, resulting in a significant loss to the taxpayer. The compromise of a substantial justification standard is understandable, yet theoretically flawed and practically cumbersome.

Whether or not the substantial justification standard is rescinded for general civil litigation involving the federal government, automatic fee shifting is warranted in fee litigation arising out of individual benefits claims, which accounts for the vast majority of EAJA disputes. Counsel, under privately arranged contingency fee contracts in disability cases, currently can claim up

to twenty-five percent of any back benefits awarded. If counsel are also able to obtain an EAJA award, they must turn over the lesser of the two awards to their clients. The change would provide more incentive to social security counsel, who have unfortunately underutilized the EAJA, to pursue EAJA fees on behalf of their clients. A revised EAJA would encourage representation for individuals with smaller benefits claims, particularly for those who cannot feasibly obtain representation through contingency arrangements. Moreover, the burden on the Social Security Administration would be partially offset by savings in litigation costs. An automatic fee-shifting mechanism, coupled with an offer-of-judgment device, could force prompt settlement of the fee issues in most cases. Overdeterrence is not likely, however, because of the cushion already provided by the substantial evidence standard. And, even if the hope of improved governance through fee shifting is fanciful, fee shifting will help restore faith in the system and attain more complete compensation for those with the greatest need.